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April 17, 2006

VIA HAND DELIVERY

Filed Electronically in Docket Office on 047/17/06 @ 11:09am

Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Jones:

BellSouth Telecommunications, Inc. ("BellSouth") submits this letter to provide the Authority with notice of additional activity by other state commissions in connection with similar proceedings as the above-referenced docket.

In a letter dated March 22, 2006, BellSouth alerted the Authority that on March 21, 2006, the Georgia Public Service Commission had reconsidered its earlier decision setting rates for switching provided pursuant to Section 271. As noted in that letter, the Georgia Commission reversed, in part, its decision on March 10, 2006, in Docket No. 19341-U and ruled that it will *not* set rates for switching under Section 271. At the time BellSouth filed its letter with the Authority a written order by the Georgia Commission was not available. On March 24, 2006, the Georgia Commission issued its written order containing its decision rendered on March 21, 2006. A copy of the Georgia Commission's Order of March 24, 2006, is enclosed. Additionally, on March 24, 2006, the Georgia Commission issued a second order in its generic change of law proceeding. This order sets forth the decision of the Georgia Commission to vacate the portion of its Order of March 9, 2005 that requires all carriers to abide by the change of law provision in their interconnection agreements to implement the terms of the TRRO with regard to new orders for unbundled local switching and dedicated loop and transport. Consequently, BellSouth is able to transition the UNE-P arrangements it has with CLECs to resale or other arrangements as negotiated by the parties pursuant to

their interconnection agreements. A copy of the Georgia Commission's second Order dated March 24, 2006, is enclosed.

On March 23, 2006 the Administrative Law Judge entered her formal recommendation in the Louisiana Public Service Commission's generic change of law proceeding, Docket Nos. U-28131 and U-28356. This Recommendation addressed all of the issues in the change of law proceeding, including the previously voted on issue of whether or not the Louisiana Commission has the authority under Section 271 or under state law to require BellSouth to include UNEs in interconnection agreements entered into under Section 252. The Louisiana Commission had previously declined to order BellSouth to include Section 271 UNEs in interconnection agreements entered into under Section 252. The Louisiana Commission likewise previously declined to set any rates for Section 271 elements. A copy of the Recommendation of the Administrative Law Judge in the Louisiana Commission's generic change of law proceeding is enclosed.

A copy of a March 27, 2006 Order issued by the New Jersey Board of Public Utilities in several consolidated dockets involving arbitrations between Verizon and several CLECs is also enclosed. The New Jersey Board of Public Utilities stated in the enclosed Order that "[t]he Board ***declines*** to require separate unbundling under sections 251, 252, and 271 of the Act, see Implementation of the FCC's Triennial Review Order, Docket No. TO03090705 (April 2, 2005), and disagrees with the need to institute any additional rate review proceedings at this time." Order dated March 27, 2006, at p. 14, New Jersey Board of Public Utilities, Docket Nos. TO05050418, TO05070606, TO05060551, and TO05060552 (emphasis added).

Finally, the Florida Public Service Commission voted on April 4, 2006 to adopt Staff recommendations supporting BellSouth's position on the line sharing, commingling, and HDSL issues.

A copy of this letter is being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

RECEIVED
MAR 2 4 2006
EXECUTIVE SECRETARY
G.P.S.C.

COMMISSIONERS:
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ROBERT B. BAKER, JR.
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Georgia Public Service Commission

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DOCKET # 19341
DOCUMENT # 90828

Docket No. 19341-U

In Re: **Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc's. Obligations to Provide Unbundled Network Elements**

ORDER ON RECONSIDERATION

I. Proceedings

On January 20, 2006, the Georgia Public Service Commission ("Commission") issued its Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271 ("Order Initiating Hearings"). In that Order, the Commission concluded that it had jurisdiction to set just and reasonable rates for de-listed unbundled network elements and scheduled hearings commencing on February 20, 2006 for the purpose of setting just and reasonable rates for de-listed UNEs pursuant to Section 271. (Order Initiating Hearings, pp. 2-5). On March 10, 2006, after holding hearings and receiving evidence and arguments of counsel, the Commission issued its Order Setting Rates Under Section 271 ("Order Setting Rates"). In the Order Setting Rates, the Commission set just and reasonable rates for unbundled local switching, high capacity loops and transport and line sharing.

The Commission adopted the rates proposed by the Competitive Carriers of the South for local switching and high capacity loops and transport. (Order Setting Rates, pp. 3-9). For the line sharing loop, the Commission adopted a loop rate of $6.50. *Id.* at 12. This figure reflects the average of the highest rates contained in the agreements Covad Communication Company has entered into with incumbent local exchange carriers. *Id.* The Commission adopted the remainder of Covad's proposed recurring and non-recurring rates for line sharing. *Id.*

II. Proceedings

As set forth in more detail in its prior orders in this docket, the Commission has jurisdiction over these matters pursuant to Sections 251, 252 and 271 of the Federal Telecommunications Act of 1996, Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23. Pursuant to state law, the Commission has the jurisdiction to set reasonable rates, terms or conditions for interconnection services. O.C.G.A. § 46-5-164(d).

III. Discussion

The Commission reconsidered the matter at its March 21, 2006 Administrative Session. On reconsideration, the Commission voted not to set a rate for local switching, but did not alter the rates it set for high capacity loops and transport and line sharing. Nothing in this decision alters the Commission's prior determinations regarding its authority to set just and reasonable rates for de-listed network elements under Section 271. Rather, the Commission concludes that it is more appropriate not to set a just and reasonable rate for local switching at this time. Therefore, as of the effective date of this order, BellSouth Telecommunications, Inc. ("BellSouth") shall be able to transition the Unbundled Network Element Platform ("UNE-P") arrangements of competitive local exchange carriers to resale or other arrangements negotiated by the parties.

* * * * *

WHEREFORE IT IS ORDERED, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that the Commission reconsiders the rates set for local switching in its Order Setting Rates, and will not to set a rate for local switching at this time. As of the effective date of this order, BellSouth shall be able to transition the UNE-P arrangements of competitive local exchange carriers to resale or other arrangements negotiated by the parties.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Special Administrative Session on the 21st day of March, 2006.

Reece McAlister
Executive Secretary

3-24-06
Date

Stan Wise
Chairman

3-24-06
Date

RECEIVED
MAR 2 4 2006
GEORGIA PUBLIC SERVICE COMMISSION
EXECUTIVE SECRETARY

Georgia Public Service Commission

244 WASHINGTON STREET, S.W.
ATLANTA, GEORGIA 30334-5701

DOCKET # 19341
DOCUMENT # 90827

Docket No. 19341-U

In Re: **Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc's. Obligations to Provide Unbundled Network Elements**

ORDER VACATING PORTION OF PRIOR ORDER

On March 9, 2005, the Georgia Public Service Commission ("Commission") issued an Order on MCI's Motion for Emergency Relief Concerning UNE-P Orders ("Order"). The order required all carriers to abide by the change of law provisions in their interconnection agreements to implement the terms of the Triennial Review Remand Order ("TRRO"). (Order, p. 7).

BellSouth Telecommunications, Inc. ("BellSouth") appealed the Order to the Federal District Court for the Northern District of Georgia. The Court granted BellSouth's request for an injunction against the Commission enforcing the order. BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services et al., 2005 U.S. Dist. LEXIS 9394 (April 5, 2005). In granting the injunction, the Court found that BellSouth had demonstrated that it had a substantial likelihood of success on the merits. *Id.* at *5. The Eleventh Circuit Court of Appeals upheld the injunction. BellSouth v. MCImetro Access Transmission Services, et al., 425 F.3d 964 (2005).

At its November 17, 2005 Administrative Session, the Commission voted to vacate the portion of its March 9, 2005 Order that requires all carriers to abide by the change of law provisions in their interconnection agreements to implement the terms of the TRRO with regard to new orders for unbundled local switching and dedicated loop and transport. This vacatur does not involve the rights of parties under separate abeyance agreements.

* * * * *

WHEREFORE IT IS ORDERED, that the portion of the Commission's March 9, 2005 Order that requires all carriers to abide by the change of law provision in their interconnection agreements to implement the terms of the TRRO is hereby vacated with regard to new orders for unbundled local switching and dedicated loop and transport.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 17th day of November, 2005.

Reece McAlister
Executive Secretary

3-24-06
Date

Stan Wise
Chairman

3-24-06
Date

LOUISIANA PUBLIC SERVICE COMMISSION
ADMINISTRATIVE HEARINGS DIVISION

DOCKET NO. U-28131

LOUISIANA PUBLIC SERVICE COMMISSION, EX PARTE

In re: Pursuant to Special Order 48-2004, Establishment of a Monitoring Docket to ensure Telecommunications Service Providers continue to honor their obligations under their approved interconnection agreements and to further ensure the carriers properly effectuate any changes to those interconnection agreements in accordance with the law, including, but not limited to, the change of law provisions in the interconnection agreements.

CONSOLIDATED WITH

DOCKET NO. U-28356

BELLSOUTH TELECOMMUNICATIONS, INC., EX PARTE

In re: Petition to establish generic docket to consider amendments to Interconnection Agreements resulting from changes of law.

RECOMMENDATION
OF THE ADMINISTRATIVE LAW JUDGE

The findings and conclusions recommended by the administrative law judge in this proceeding are contained within the Draft Order following this cover page.

This recommendation is being issued and forwarded to the Commissioners pursuant to Rule 56 of the Rules of Practice and Procedure of the Louisiana Public Service Commission. The recommendation will be considered and voted on by the Commissioners at an upcoming monthly Commission meeting.

All parties are advised to familiarize themselves with the Commission's Rules of Practice and Procedure, including provisions within Rule 56 which permit parties to request (within five working days of issuance of the recommendation) the opportunity to present oral argument at the Commission meeting at which this recommendation will be considered. Copies of the Rules of Practice and Procedure of the Louisiana Public Service Commission are available from the Records and Recording Division which can be reached at (225) 342-3157.

All parties are further advised that they may ascertain whether this recommendation will be considered at the Commission's next monthly meeting by accessing the Commission's web page at **http://www.lpsc.org** and "clicking" on **Official Business** to view the Agenda for the Commission's upcoming monthly meeting. Alternatively, parties may obtain this information by calling the Commission's Administrative Hearings Division at either of the following telephone numbers:

(225) 219-9417 or **(800) 256-2397**.

Baton Rouge, Louisiana, this 23rd day of March, 2006.

Valerie S. Meiners signed by LJS Hebert with Permission
Valerie Seal Meiners
Chief Administrative Law Judge

cc: Official Service List

Louisiana Public Service Commission
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Docket No.: U-28131, U-28356 Consolidated

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LOUISIANA PUBLIC SERVICE COMMISSION
ADMINISTRATIVE HEARINGS DIVISION

DOCKET NO. U-28131

LOUISIANA PUBLIC SERVICE COMMISSION, EX PARTE

In re: Pursuant to Special Order 48-2004, Establishment of a Monitoring Docket to ensure Telecommunications Service Providers continue to honor their obligations under their approved interconnection agreements and to further ensure the carriers properly effectuate any changes to those interconnection agreements in accordance with the law, including, but not limited to, the change of law provisions in the interconnection agreements.

CONSOLIDATED WITH

DOCKET NO. U-28356

BELLSOUTH TELECOMMUNICATIONS, INC., EX PARTE

In re: Petition to establish generic docket to consider amendments to Interconnection Agreements resulting from changes of law.

RECOMMENDATION
OF THE ADMINISTRATIVE LAW JUDGE

Background

These consolidated dockets were instituted as vehicles through which the Louisiana Public Service Commission could ensure that parties to interconnection agreements in Louisiana continue to honor their obligations under those agreements and properly effectuate changes to those agreements in accordance with changes in the law. In 1996, the United States Congress enacted legislation for the purpose of developing competitive markets in the telecommunications industry.[1] Of critical significance to that goal is Section 251 of the Act, which requires incumbent local exchange carriers (or ILECs) to provide to requesting telecommunications carriers interconnection with and access to elements of the ILEC's network on an unbundled basis at cost-based (as opposed to market-based) rates. The Act, in Section 252, provides for the

[1] The Telecommunications Act of 1996 was enacted at 47 USC251, *et. seq.*

formalizing of these relationships between ILECs and requesting telecommunications carriers through *interconnection agreements* (or "ICAs" or "252 Agreements") and provides for oversight of these interconnection agreements by State Commissions.

The Federal Communications Commission (FCC) is charged with the responsibility for implementing the Telecommunications Act. In recent years, the FCC has altered the list of UNEs - network elements which must be unbundled and made available by ILECs at cost-based rates under Section 251 of the Telecommunications Act. These changes have thrown the telecommunications industry into periods of uncertainty and are at the heart of these consolidated proceedings. Specifically, the Commission is being requested here to address changes wrought by the FCC's 2003 Triennial Review Order ("TRO")[2] and the FCC's 2005 Triennial Review Remand Order ("TRRO")[3] to the obligations of ILEC BellSouth Telecommunications, Inc. ("BellSouth") and competitive local exchange carriers (or CLECs) who have entered into interconnection agreements with BellSouth for the purpose of accessing and utilizing unbundled elements of BellSouth's network.

On May 27, 2004, the Competitive Carriers of the South, Inc. ("CompSouth") filed a petition with the Commission, requesting the issuance of an emergency declaratory ruling that the obligations of parties to interconnection agreements would remain in effect unless and until effectively amended and approved by the Commission. In response to that petition, the Commission issued Special Order 48-2004,[4] which directed that a docket be opened:

> to ensure the parties continue to honor their obligations under the approved interconnection agreements and to further ensure the parties properly effectuate any changes to those interconnection agreements in accordance with the law,

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003)
[3] Order on Remand, Unbundled Access to Network Elements; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 20 FCC Rcd. 2533 (2005).
[4] The Commission's Special Order 48-2004 was decided at the Commission's June 9, 2004 Business and Executive Session and issued on August 18, 2004.

including, but not limited to, the change of law provisions in the interconnection agreements.

Accordingly, Docket U-28131 was opened on August 14, 2004, and various telecommunications providers intervened.

Within Docket U-28131, the Commission issued Order U-28131 on April 26, 2005 and superseded that order with Order U-28131A, issued on May 19, 2005. Those orders address requirements of the FCC's TRRO concerning mass market local circuit switching and the obligation of BellSouth to provide access to UNE-P ("unbundled network elements – platform"). Access to UNE-P (the combination of an unbundled loop, unbundled local circuit switching, and shared transport[5]) on an unbundled basis permits the CLEC to provide "end-to-end" service to a customer completely through the use of the ILEC's network.

In the TRRO, the FCC advised of its decision to no longer impose a section 251 unbundling requirement for mass market local circuit switching.[6] The FCC based its decision upon a finding, among others, that competitive local exchange carriers (CLECs) have "deployed a significant, growing number of their own switches" and "similar deployment is possible in other geographic markets." Thus, the FCC determined that a CLEC's ability to provide mass market local switching services in the market was not impaired by its inability to access mass market local switching as an unbundled network element.

In Order U-28131-A, the Louisiana Commission concluded that BellSouth was not required to provide new switching UNEs to CLECs, as a result of the FCC's TRRO, but that BellSouth was required to continue providing UNE-P to those CLECs who were leasing UNE-P

[5] TRRO at §6.
[6] *Id.*; TRRO at §199.

as of the effective date of the TRRO – the "existing base of UNE-P customers" - pending completion, on March 10, 2006, of a 12-month transition period established in the TRRO.[7]

Meanwhile, on November 1, 2004, BellSouth had filed a petition requesting the establishment of a generic docket to consider amendments to interconnection agreements resulting from changes of law. The Commission Staff filed a motion on July 6, 2005 to consolidate the generic docket, U-28356, with Docket U-28131. That motion was granted on July 25, 2005, and a procedural schedule for addressing changes to interconnection agreements resulting from the FCC's TRO and TRRO was established.[8] Although a hearing was scheduled in this proceeding, the procedural schedule was disrupted by Hurricanes Katrina and Rita. The rescheduled hearing date was also canceled, due to the unavailability of a BellSouth witness. Ultimately, and with the consent of all parties, the matter proceeded as a paper proceeding – for consideration on written testimony, exhibits, and briefs.

On February 22, 2006, the Louisiana Commission, at its Business and Executive Session, asserted its primary jurisdiction pursuant to Rules 51 and 57 of the Commission's Rules of Practice and Procedure, with regard to one of the 25 issues identified by the parties to this proceeding. Issue Number 8 is stated by the parties as follows:

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[7] Louisiana Public Service Commission Order Number U-28131-A on Reconsideration, decided April 20, 2005 and issued on May 19, 2005.

[8] Along with the Commission Staff, BellSouth, and CompSouth, other parties who have participated in the consolidated proceedings are Sprint Communications Company L.P. ("Sprint"); AT&T Communications of the South Central States, LLC ("AT&T"); MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLC (collectively "MCI"); US LEC Communications, Inc. ("US LEC"); the Small Company Committee of the Louisiana Telecommunications Association ("SCC"); Cox Louisiana Telecom, LLC ("Cox"); DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"); Gulf Coast Utilities, Inc. ("Gulf Coast"); Image Access, Inc. d/b/a NewPhone ("NewPhone"); NewSouth Communications, Corp. ("NewSouth"); Xspedius Communications, LLC ("Xspedius"); and ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom ("ITC^DeltaCom").

Issue Number 8

(a) Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

(b) If the answer to part (a) is affirmative in any respect, does the Authority have to establish rates for such elements?

(c) If the answer to part (a) or (b) is affirmative in any respect,

(i) what language, if any, should be included in the ICA with regard to the rates for such elements, and

(ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?

With regard to Issue Number 8, the Commission:

- declined to order BellSouth to include Section 271[9] elements in Section 252 agreements;
- declined to set rates for Section 271 elements;
- adopted BellSouth's proposed contract language with respect to Issue 8; and
- directed that any CLEC which files an enforcement action with the FCC regarding 271 elements shall provide a copy of the filing to the Commissioners so that the Commission may intervene and advise the FCC of its recommendation, if deemed necessary.[10]

The remaining 24 issues are addressed herein.

Jurisdiction

The Louisiana Constitution provides that the Public Service Commission "shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law" and "shall adopt and enforce reasonable rules, regulations, and procedures necessary for the

[9] Section 271 of the Telecommunications Act addresses the entry of Bell operating companies into the interLATA market and the requirements which must be met, including a checklist of access and interconnection requirements.
[10] Louisiana Public Service Commission Order U-28131 Consolidated with Order U-28356, issued on March 7, 2006.

discharge of its duties."[11] Pursuant to constitutional and statutory authority, the Commission is given broad power to regulate telephone utilities and may adopt reasonable and just rules, regulations, and orders affecting telecommunications services.[12] The Commission has exercised jurisdiction over many aspects of telecommunications services in the state, including the promulgation and enforcement of rules applicable to local competition among telecommunications providers.[13] Specifically with regard to the issues raised in this proceeding, the Commission also exercises jurisdiction pursuant to a federal delegation of authority. The Telecommunications Act of 1996, in Section 252, specifically delegates oversight authority over interconnection agreements to State Commissions.

Analysis of the Issues

The parties to this proceeding have identified 25 issues to be considered and decided by the Commission. The issues arise from changes in the law effected by the FCC's TRO and TRRO and applicable to interconnection agreements and the unbundling of network elements. Specifically, the FCC announced changes to the unbundling obligations imposed upon ILECs. Noting its intent to encourage innovation and investment through "facilities-based competition," the FCC determined it appropriate to impose unbundling obligations "only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable facilities-based competition."[14]

[11] La. Const. Art. IV Section 21(b).
[12] South Central Bell Telephone Co. v. La. Pub. Serv. Comm., Supp. 1977, 352 So. 2d 999.
[13] Most recently amended by the Commission's General Order dated October 31, 2005.
[14] TRRO at §2.

The parties to the proceeding – BellSouth (the ILEC) and the Intervenors[15] (the CLECs) – have presented their positions regarding the impact and implementation of the changes in the law and have proposed language to be included in interconnection agreements concerning each of the identified issues. The Commission Staff has also submitted its position with regard to the issues identified by the parties.

Issue Number 2

What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's Triennial Review Remand Order ("TRRO"), issued February 4, 2005?

As a result of its reexamination of the unbundling obligations of ILECS, the FCC concluded in its TRRO that ILECs would no longer be required to unbundle local circuit switching, certain high capacity loops, dark fiber loops, and certain dedicated transport. Recognizing the significance of this change to the ILECs' existing CLEC customer base, the FCC established transition periods and transition pricing with regard to the conversion of the "de-listed" elements to alternative arrangements. The transition period for local switching, certain high capacity loops, and certain dedicated transport is 12 months – ending on March 11, 2006. The transition period for dark fiber loops and transport is 18 months – ending on September 10, 2006. Issue 2 concerns the implementation of this transition plan.

The parties do not appear to disagree as to the beginning and ending of the transition periods established by the FCC and there appears to be no disagreement that transitional pricing shall be retroactive to the beginning point of the transition period. The points of disagreement between BellSouth and the CLECs concern (1) whether CLECs may place orders to migrate to

[15] Although numerous CLECs have intervened in this proceeding, the position of the CLECs has been presented, for the most part, through the filings of the Competitive Carriers of the South, Inc. ("CompSouth").

alternative arrangements at any point within the transition period and (2) whether transition pricing ends prior to the end of the transition period upon a CLEC's migration to alternative arrangements.

BellSouth contends that CLECs must place their orders early enough during the transition period to allow for an orderly migration to alternative arrangements by the end of the transition period. BellSouth further contends that once a CLEC has migrated to an alternative arrangement, the rates of that alternative arrangement apply – even if the transition period has not ended. The CLECs assert that the FCC requires only that the orders for migration be submitted within the transition period. Further, the CLECs contend that while they have a strong interest in an orderly transition, they are under no obligation to pay higher than the transition rates at any time during the transition period. Thus, the CLECs assert that transition pricing should continue to apply throughout the transition period, even if they have migrated de-listed elements to alternative arrangements during that period. The Commission Staff takes the position that CLECs may submit conversion orders at any time prior to the end of the transition period, but that, once the transition period ends, BellSouth may charge the CLEC at commercial, market-based rates as opposed to cost-base rates, even if the migration to alternative service arrangements has not been completed.

The CLECs further urge that interconnection agreements should provide for a transition period applicable in the event of future determinations that a wire center has reached a threshold of non-impairment. The TRRO has established thresholds – minimums – of business lines and fiber collocators, which determine whether or not certain high capacity loops and transport must be provided by ILECs on an unbundled and cost-based basis. When it is determined, from a count of business lines and fiber collocators, that a wire center has reached an established threshold, the ILEC's obligations to provide certain high-capacity loops and dedicated transport

change, and CLECs will be forced to migrate to alternative arrangements. Thus, the CLECs seek the establishment of a transition period for such future circumstances. The Commission Staff agrees with the CLECs that a transition period should be established for such future situations. The Staff takes the position that once a wire center has been determined to have met a threshold, BellSouth should be required to provide notice to the CLECs, who will then have a 90-day transition period for converting to alternative service arrangements.

Analysis

Recognizing that its de-listing of certain unbundled network elements marked a significant change in the telecommunications industry, the FCC established transition periods to allow CLECs to migrate to alternative facilities or arrangements. We find that the language of the TRRO suggests an intention and anticipation by the FCC that the transition periods would be used by the CLECs and BellSouth to fully accomplish the conversion to alternative arrangements, with the final transition to alternative arrangements to occur at the end of the applicable transition period. In discussing de-listed dedicated transport, for example, the FCC stated:

> Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. *At the end of the twelve-month period, requesting carriers must transition* the affected DS1 or DS3 dedicated transport UNEs to alternative facilities or arrangements.[16] (Emphasis Supplied.)

The FCC used almost identical language in explaining the transition periods for high capacity loops and local circuit switching.[17]

[16] TRRO at §143.
[17] See TRRO at §§196 and 227, describing the transition of high capacity loops and local circuit switching.

The FCC further provided for transitional rates to be applied to de-listed unbundled network elements which were being leased by the CLEC as of the effective date of the TRRO. We find that the language of the TRRO suggests an intention by the FCC to apply the transitional rates to de-listed UNEs which a CLEC chooses to continue leasing, throughout the 12-month or 18-month applicable transition period, in order to protect against "rate shock." The TRRO provides, for example, that

> *during the relevant transition period*, any dedicated transport UNEs that a competitive LEC leases as of the effective date of this Order, but for which the Commission determines that no section 251(c) unbundling requirement exists, *shall be available for lease* from the incumbent LEC at [transitional rates]. We believe that the moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition, provide some protection of the interests of incumbent LECs in those situations where unbundling is not required.[18] (Emphasis Supplied.)

The TRRO contains similar provisions concerning the transitional pricing of de-listed high capacity loops and local circuit switching.[19]

Thus, it is our conclusion that de-listed UNEs leased by a CLEC as of the effective date of the TRRO must be made available for lease by the CLEC at the established transitional rates throughout the applicable transition periods of 12 or 18 months. During the transition periods, CLECs and BellSouth are to take the necessary steps to convert all of the de-listed UNEs to alternative arrangements. However, the actual "transition" date, for purposes of the application of transitional rates, shall occur on the last day of the applicable transition period, at which point transitional rates shall no longer apply.

To the extent a CLEC migrates to other services offered by BellSouth, that migration at the end of the transition period may be reflected solely in a price change, which shall become

[18] *TRRO at §145.*
[19] TRRO at §198 (high-capacity loops) and §228 (local circuit switching).

applicable at the end of the transition period. If an amended interconnection agreement becomes effective after the transition period ends, the new rates applicable to de-listed UNEs supplied by BellSouth will be made retroactive to the date the transition period ended. No matter what choice a CLEC makes regarding a de-listed UNE – to migrate to other services offered by BellSouth at market-based rates, to obtain comparable services from another telecommunications provider, or to utilize its own facilities - BellSouth's obligation to provide the de-listed UNEs at the transition rates ends upon the end of the applicable transition period but not before.

We agree with the Commission Staff and the CLECs that interconnection agreements should provide for a transition period in the event of future UNE de-listings occurring when a wire center is determined to be unimpaired. We discuss wire center classifications and applicable procedures at Issue Number 5.

Further, with regard to transitional pricing of de-listed UNEs, we note that neither the TRRO nor the rules promulgated to implement the TRRO use "TELRIC rates" in the calculation of transitional rates. Instead, transitional rates are calculated by adding a margin (15% or $1.00) to the higher of whatever rate the requesting carrier paid for the element as of June 15, 2004, or the rate, if any, established by the state commission between June 16, 2004 and the effective date of the TRRO. Accordingly, interconnection agreements must conform to that pricing language.

Issue Number 3

(a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?
(b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

Analysis

The TRRO addresses implementation of the changes in law through use of the procedures outlined in Section 252 of the Telecommunications Act. That Section provides for the negotiation, arbitration, and State Commission approval of interconnection agreements between ILECs and CLECs:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.[20]

Accordingly, ILECs and CLECs whose interconnection agreements are impacted by the changes in law addressed in this proceeding must move promptly, after the effective date of the Order in this proceeding, to execute amendments to those interconnection agreements to effect the Commission's decisions here. It appears that there is no disagreement between BellSouth and the CLECs on that point. The CLECs and BellSouth are directed to initiate that process by submitting to the Commission Staff for approval, within sixty (60) days of the effective date of this Order, language which implements the decisions contained herein.

Similarly, as both BellSouth and the CLECs suggest, it is appropriate that all pending arbitration proceedings shall be bound by the decisions of the Commission in this proceeding, except with regard to issues as to which the parties have negotiated a different treatment.

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[20] TRRO at §233.

Issue Number 4

What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined?

i. **Business Line**
ii. **Fiber-Based Collocation**
iii. **Building**
iv. **Route**

The TRRO establishes "tests" in the TRRO to determine whether or not BellSouth continues to have an obligation to provide high capacity loops and dedicated transport as unbundled network elements at cost-based rates. The tests are designed to indicate whether competitive provision of services is feasible in a wire center service area, based upon the number of business access lines and fiber-based collocators contained in the wire center. The FCC has determined that if a wire center contains threshold numbers of business lines and fiber-based collocators, impairment to CLECs no longer exists, and BellSouth's obligations change. In discussing high-capacity loops, for example, the TRRO advises:

> [W]e find that the presence of fiber-based collocations in a wire center service area is a good indicator of the potential for competitive deployment of fiber rings. We further find . . . that a wire center service area's business line count is indicative of its location in or near a large central business district, which is likely to house multiple competitive fiber rings . . . with laterals to multiple buildings. A high concentration of business lines generally indicates a likely concentration of large, multi-story commercial buildings, which in turn may justify the construction of fiber networks. Thus, high business line counts and the presence of fiber-based collocators, when evaluated in conjunction with one another, are likely to correspond with actual self-deployment of competitive LEC loops or to indicate where deployment would be economic and potential deployment likely.[21]

Accordingly, the TRRO adopts threshold counts of business lines and fiber-based collocators to determine the status of impairment at a wire center. For example, BellSouth is obligated to lease to a CLEC a DS1 loop to a building - as a UNE at cost-based rates - unless the

[21] TRRO at §167.

building is served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center meets that threshold count of business access lines and fiber-based collocators, BellSouth no longer has the obligation to provide that DS1 loop at cost-based UNE rates.[22] Similarly, BellSouth's obligation to provide DS3 loops as UNEs ends when a wire center meets a threshold count of at least 38,000 business lines and at least four fiber-based collocators.[23]

With regard to dedicated transport, the threshold counts apply to the wire centers at either end of a requested transmission route. The wire centers are considered to be impaired – and BellSouth has the obligation to provide the dedicated transport as a cost-based UNE – if the wire center at either end of the route contains fewer than the threshold count of business lines or fiber-based collocators. Upon a determination that a wire center is a "Tier 1" wire center, in that it contains at least 38,000 business lines or four fiber-based collocators or both, BellSouth is no longer obligated to provide DS1 or DS3 dedicated transport as UNEs. Upon a determination that a wire center is a "Tier 2" wire center, in that it contains at least 24,000 business lines or three fiber-based collocators or both, BellSouth is no longer obligated to provide DS3 dedicated transport as a UNE.[24] A wire center determined to be "Tier 3" meets none of these thresholds, and BellSouth remains obligated to provide dedicated transport as a UNE.

A wire center's attainment of these thresholds carries significant impact to BellSouth and the CLECs; thus, the meaning assigned to the terms used to describe these thresholds is critical. In Issue Number 4, the parties request the Commission's definition of the terms "business line," "fiber-based collocation," "building," and "route." Some of these terms are defined in the TRRO

[22] 47 C.F.R. §51.319(a)(4)(i).
[23] 47 C.F.R. §51.319(a)(5)(i).
[24] 47 C.F.R. §51.319(e).

and implementing regulations; however, the parties disagree as to the proper interpretation and application of the terms.

Business Line

A "business line" is defined in FCC regulations as follows:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
> (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
> (2) Shall not include non-switched special access lines,
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines." [25]

The interpretations of this definition by BellSouth and the CLECs lead to different results. BellSouth contends that the definition calls for an inclusion of *all unbundled loops* in the count of business lines. BellSouth points to individual elements of the definition in support of its position that all UNE loops, including unswitched and residential loops, should be counted. For example, as BellSouth points out, the second sentence of the definition states that the count of business lines shall include all ILEC business lines plus "all UNE loops connected to that wire center."

The CLECs urge a reading of the definition as a whole. They claim that BellSouth's emphasis on the individual parts, rather than the totality, of the definition results in an interpretation which is internally inconsistent and irrational. Instead, the CLECs argue, the first sentence provides the core definition of a "business line," from which the remaining phrases provide elaboration.

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[25] 47 C.F.R. §51.5.

Analysis

In the TRRO, the FCC describes the impairment tests and thresholds it is putting into place with regard to the provision of high-capacity loops and dedicated transport, placing particular emphasis upon the presence and significance of numerous "business lines" to the wire center. In the regulations promulgated to implement the TRRO, the FCC provides a definition of the term "business line." That definition starts out by describing a "business line" as an ILEC-owned "switched access line used to serve a business customer." The second sentence of the definition starts: "The number of *business lines* in a wire center shall equal . . . ." And the third sentence refers to requirements of the *business line tallies*.

Clearly, the first sentence establishes the fundamental description of a business line – an *ILEC-owned switched access line used to serve a business customer*. The remainder of the definition provides further particulars of *ILEC-owned switched access business lines* to be included in the count for purposes of establishing impairment at wire centers, but does not expand upon the fundamental description provided in the first sentence. To interpret the definition otherwise, as BellSouth does, placing emphasis on individual provisions without reference back to the first sentence, renders the definition internally inconsistent and completely at odds with the FCC's stated rationale of utilizing the presence of "business lines" as a test of impairment.

Fiber-Based Collocation

The briefs of the parties indicate that there is no dispute currently existing between them concerning the definition of fiber-based collocation.

Building

The term "building" has significance to BellSouth's obligation to provide high-capacity loops as unbundled network elements. The TRRO places "caps" on the number of DS1 and DS3 loops a requesting carrier may obtain from BellSouth to "any single building."[26] The FCC has not provided a definition of the term "building".

BellSouth urges the utilization of a "reasonable person" definition of "building", suggesting that a reasonable person would consider a single structure building, like One Shell Square in New Orleans, one building, regardless of the number of tenants who may be residing in the building. Similarly, according to BellSouth, a complex of two separate high-rise buildings, such as Chase Towers in Baton Rouge, would be considered two buildings.

The CLECs suggest a "reasonable telecom person" standard, suggesting that a reasonable telecom person would view a "building" from the perspective of a network engineer. From this perspective, the CLECs suggest, a high-rise building with a single telecommunications equipment room would be considered a single building, while a strip mall with separate telecom service points for each individual business in the mall would not. Instead, each business in the strip mall would be considered a separate premises even though the businesses share common walls. The deciding factor in defining a "building", the CLECS contend, is that it is served by a single point of entry for telecom services.

Analysis

The FCC provided no indication that the word "building" should be given other than its ordinary meaning; thus, it would appear appropriate to apply BellSouth's suggested "reasonable person" standard in determining what constitutes a "building". However, as the CLECs point

[26] 47 C.F.R. §51.319(a)(4).

out, the perspective of a reasonable person in the telecom industry might take into consideration factors which might be of no significance to someone outside the industry. Because the determination at issue here is of great significance to the telecommunications industry, we believe that it is entirely appropriate to consider the context in which the determination is being made.

Accordingly, we find that a determination of what constitutes a "building" must be made from a "reasonable person" perspective, but within the context of the telecom industry, and must take into account the FCC's purpose and rationale behind the determination. We believe that most *building* determinations will be quite obvious, while others will require consideration of various factors. For that reason, we do not believe it appropriate to announce one "all-purpose" rule applicable to such determinations. Should disputes arise in the future, the parties may petition the Commission for resolution on a case-by-case basis. If it becomes apparent that a more structured approach is necessary, we will initiate a rule-making proceeding for the purpose of analyzing disputed issues in "building" determinations and promulgating appropriate rules to address those issues.

Route

"Route" is a term of significance to BellSouth's provision of dedicated transport to CLECs. "Route" is defined by the FCC regulations as

> a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., wire center or switch "A" and wire center or switch "Z") are the same "route,"

irrespective of whether they pass through the same intermediate wire centers or switches, if any.[27]

The TRRO requires an ILEC to unbundle dedicated transport between any pair of ILEC wire centers except where both wire centers defining the route are unimpaired wire centers. Thus, an ILEC must unbundle dedicated transport if a wire center at either end of a requested route is impaired.

Both BellSouth and the CLECs voice concern over the possible manipulation of routes in order to accomplish a result that is unfair in the eyes of the other.

Analysis

We decline to anticipate the hypothetical activity complained of by the parties and will defer any comment on the subject until such time as any party asserts an actual instance of an improper manipulation of routes. We defer to the FCC definition, which we believe makes clear that a "route" is defined by its end points, regardless of whether it passes through one or more intermediate wire centers or switches.

Issue Number 5

(a) **Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?**

(b) **What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?**

(c) **What language should be included in agreements to reflect the procedures identified in (b)?**

There is no apparent dispute between BellSouth and the CLECs with regard to part (a) of this issue. Both sides agree that the Louisiana Public Service Commission is charged with

[27] 47 C.F.R. §51.319(e).

resolving disputes arising under interconnection agreements and implementing changes to interconnection agreements necessitated by the TRRO. Thus, with regard to Issue Number 5, the Commission is asked only to resolve any disagreement among the parties concerning the appropriate procedures to be used to identify wire centers which satisfy the FCC's non-impairment criteria for high-capacity loops and dedicated transport.

The CLECs propose the establishment of an annual filing procedure, timed coincident with BellSouth's annual filing of ARMIS business line data on April 1 of each year. Automated Reporting Measurement Information System (ARMIS) reports are filed annually with the FCC by all ILECs. The CLECs propose that, coincident with BellSouth's ARMIS filing each year, BellSouth would file with this Commission a proposed list of any new wire centers meeting TRRO non-impairment criteria. BellSouth's filing at this Commission would state the number of business lines and fiber-based collocators in each wire center as of December 31 of the preceding year. CLECs would have until May 1 to file a challenge to any wire center classified as unimpaired by BellSouth, and the Commission would have a hearing one month later to take evidence on the disputed wire center. Under the CLECs' plan, the Commission would issue a decision by June 15, and any changes to the wire center designations would become effective on July 1.

BellSouth takes the position that the Commission need not establish procedures or guidelines for identifying non-impaired wire centers. BellSouth contends that the FCC has provided adequate guidance to allow BellSouth to identify the non-impaired wire centers without the need for intervention by this Commission. Accordingly, BellSouth has determined from 2003 and 2004 data that Louisiana has 5 Tier 1 wire centers and 3 Tier 2 wire centers (relevant to the provision of dedicated transport on an unbundled basis) and that Louisiana has 2 wire centers

in which CLECs are not impaired with regard to DS3 high capacity loops and 1 wire center in which CLECs are not impaired with regard to DS1 loops.

Analysis

The classification of wire centers as impaired or non-impaired is a matter of critical concern to telecommunications providers in Louisiana. Therefore, we believe it important that the classification of wire centers be handled in an open and efficient fashion – in order to instill a sense of fairness and stability in the state's telecommunications market. We find that the annual filing procedure proposed by the CLECs provides, assuming some adjustments,[28] an appropriate framework for a fair and efficient classification of wire centers. Such an annual filing would provide for a regular review of the status of wire centers in Louisiana, but would not preclude BellSouth from filing a request for wire center reclassification at any other time in the year as well.

Accordingly, we direct the Commission Staff to draft, with input from BellSouth and the CLECs, proposed procedural rules applicable to wire center determinations. The rules should provide a procedural framework within which any disputed issues may be reviewed and resolved in a fair and efficient manner. We will consider the proposed rules at our next Business and Executive Session.

Although BellSouth has submitted its own determinations concerning the current impairment status of Louisiana wire centers, we believe that reliance solely on BellSouth's calculations would be inappropriate. Moreover, decisions made within this proceeding may alter BellSouth's calculations. Finally, we are uncertain of the impact of Hurricanes Katrina and Rita

[28] Some adjustments to the CLECs' proposal would be necessary, for example, to comply with the Louisiana Commission's Rules of Practice and Procedure.

on the calculations previously conducted by BellSouth and how such impact should be addressed in the context of wire center classification. Nevertheless, to the extent BellSouth and the CLECs have no dispute with regard to the classification of certain wire centers, they shall jointly file, within sixty (60) of the effective date of this Order, a request for Commission approval of those wire center classifications. Upon the Commission's approval, the new classifications will go into effect.

Issue Number 6

Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

Issue Number 6 poses another definition question. The federal regulations define a DS1 loop as "a digital local loop having a total digital signal speed of 1.544 megabytes per second."[29] The very next sentence states that "DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including TI services."[30]

What qualifies as a DS1 loop is significant, in that BellSouth has no obligation to provide a DS1 loop UNE from a non-impaired wire center.[31] The definition is also significant to the calculation of "business lines" used to determine the classification of a wire center. For purposes of the "business line" count, the federal regulations direct that, with regard to digital access lines, each 64 kbps-equivalent shall be counted as one line. "For example, a DS1 line corresponds to

[29] 47 C.F.R. §51.319(a)(4).
[30] *Id.*
[31] *Id.*

24 64 kbps-equivalents, and therefore to 24 'business lines.'"[32] If an HDSL-capable copper loop is considered the equivalent of a DS1 loop, it will be counted as 24 "business lines."

BellSouth contends that it has no obligation to unbundle HDSL-capable copper loops from wire centers which have been classified as non-impaired for purposes of DS1 loop unbundling, for the reason that HDSL-capable copper lines are considered the equivalent of DS1 loops. In support of this position, BellSouth points to the provision in the federal regulations, quoted above, that DS1 loops *include* two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services.

Similarly, BellSouth argues that HDSL-capable copper loops, because they are the equivalent of DS1 loops, should be counted as DS1 loops for purposes of calculating the number of business lines from a wire center in impairment determinations. Therefore, according to BellSouth, since one DS1 line corresponds to 24 "business lines," under the federal regulations, an HDSL-capable copper loop should also be counted as 24 "business lines."

The CLECs argue that HDSL-capable copper loops are not the equivalent of DS1 loops. They contend that an "HDSL-capable copper loop" is nothing more than a copper loop facility which is *clear of equipment that could block* provision of high-bit rate digital subscriber line services. It should not be considered a DS1 loop for purposes of impairment, the CLECs argue, unless electronics are added that permit the copper loop to provide a service featuring speeds of 1.544 megabytes per second.

The CLECs contend that BellSouth is again focusing on the wrong aspects of the definition of DS1 loops provided in the regulations. According to the CLECs, the definition makes clear that a DS1 loop must be capable of sending signals at a speed of 1.544 mbps; while noting that various types of copper loops can be used to provide such signal speeds, including

[32] 47 C.F.R. §51.5.

HDSL-capable loops, the definition does not convert every copper loop that meets the characteristics of being "HDSL-capable" into a DS1 loop. Only with electronics added, the CLECs contend, does an HDSL-capable copper loop become the equivalent of a DS1 loop.

Thus, the CLECs argue that even if a wire center is classified non-impaired with regard to the unbundled provision of DS1 loops, BellSouth remains obligated to unbundle HDSL-capable loops *without* the electronics needed to facilitate 1.544 mbps services. Further, the CLECs contend that HDSL-capable copper loops to which the necessary electronics have not been added to facilitate 1.544 MBPS services should *not* be counted as "business lines" for purposes of classifying wire centers.

Analysis

We find the CLECs' rationale persuasive. Once again, we look to the basic thrust of the FCC's definition of a DS1 loop: "a digital local loop having a total digital signal speed of 1.544 megabytes per second." The regulation goes on to include, as DS1 loops, "two-wire and four-wire copper loops capable of providing high-bit rated digital subscriber line services." However, in order to make sense in the context of the overall definition of DS1 loops, that second sentence must be interpreted to include as DS1 loops *only* those two-wire or four-wire copper loops to which the necessary electronics have been added to permit the use of those copper loops for 1.544 mbps services.

Issue Number 9

What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?

The TRRO's transition plans provide for 12 and 18-month transition periods during which CLECs may continue leasing de-listed UNEs, while taking steps to migrate from the de-listed UNEs to alternative facilities. The TRRO notes that the transition plans "shall apply only to *the embedded customer base.*"[33] Issue Number 9 concerns the definition of "embedded customer base," to which the transition plans apply and what changes to the embedded base are permissible during the transition periods.

The CLECs emphasize the word "customer" in the phrase "embedded customer base." They take the position that a CLEC should be able to continue servicing its existing end users, or customers, and make "adds" (adding additional lines), "moves" (moving to a customer's new address), or "changes" (adding or deleting a feature) on behalf of those customers during the transition period.

BellSouth argues that the transition period applies only to the *embedded base of UNE arrangements* (as opposed to embedded *customers*) and does not permit CLECs to "add" new local switching, UNE-Ps, high capacity loops, or high capacity transport in unimpaired wire centers or in excess of the caps. BellSouth does, however, agree to make "changes" in features to the embedded base of UNE arrangements.

[33] TRRO at §§142, 195, and 227.

Analysis

Although the TRRO does not specifically define the phrase "embedded customer base," other provisions in the TRRO, as well as the federal regulations implementing the TRRO's transition period instructions, provide insight into the meaning to be assigned to that phrase. For example, the TRRO specifically instructs that the transition periods shall not permit competitive LECs to *add* new de-listed UNEs – including new UNE-P arrangements, new high-capacity loops, and new dedicated transport.[34] Further, the TRRO provides that transition *pricing* is applicable to de-listed dedicated transport and high-capacity loops *that a CLEC was leasing as of the effective date of the Order*, but for which the Commission determines that no section 251(c) unbundling requirement exists.[35] Similarly, the federal regulations implementing the TRRO provide that the transition periods apply to de-listed high-capacity loops and dedicated transport *that a CLEC was leasing as of the effective date of the TRRO.* [36] We conclude from this language that the phrase "embedded customer base" is properly defined as the CLECs' base of leased UNEs as of the effective date of the TRRO. Accordingly, we concur with BellSouth's definition of "embedded customer base."

Addressing BellSouth's obligation to implement "add" orders related to the CLECs' embedded base of UNE arrangements during the transition period, we find that the TRRO clearly prohibits "adds" to the CLECs' base of leased de-listed UNEs during the transition period. We similarly conclude that "move" orders are also prohibited, in that such orders alter the CLECs' embedded UNE arrangements, to which the transition periods apply. Finally, there appears to be no dispute between the parties concerning BellSouth's implementation of "change" orders.

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[34] *Id.*
[35] TRRO at §§145 and 198.
[36] 47 C.F.R. §51.319(a)(4)(iii) and §51.319(e)(2)(ii)(C) and (iii)(C).

Issue Number 10

What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and

(a) what is the proper treatment for such network elements at the end of the transition period; and

(b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

The parties agree that the concerns presented in Issue Number 10 are largely addressed in the discussion of other issues in this proceeding, particularly Issues 2 and 5. The question remaining under Issue Number 10 concerns the process by which UNEs which were de-listed by the 2003 TRO, but for which the FCC has provided no specific transition plan, should be converted to alternative arrangements. It appears that the parties generally concur in a process by which BellSouth shall provide written notice to CLECs who still have rates, terms, and conditions for these de-listed UNEs in their interconnection agreements. The affected CLECs shall then have thirty (30) days to submit orders to disconnect or convert the de-listed UNEs to other arrangements.

We approve of this process, as it provides for fair notification to the CLECs and fair opportunity for the CLECs to submit orders to disconnect or convert. We further concur with the CLECs' proposal that BellSouth be required to provide, in the written notice, specific identification of the service agreements or services which must be disconnected or converted. We also concur with BellSouth's proposal that to the extent the CLEC requests BellSouth to convert the de-listed UNE to alternative arrangements, BellSouth shall be permitted to assess non-recurring charges associated with that conversion. Finally, if a CLEC disputes BellSouth's identification of UNEs which must be disconnected or converted, the CLEC shall send written

notice of its dispute, within thirty (30) days of BellSouth's notice. BellSouth shall not disconnect the disputed UNEs while the dispute is being resolved. If the parties are unable to reach a voluntary resolution of the dispute, they may petition the Commission for assistance.

Issue Number 11

What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms and conditions that apply in such circumstances?

The questions posed in Issue Number 11 are addressed under Issue Number 2.

Issue Number 13

Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

The SQM/PMAP/SEEM performance measurements were instituted to confirm and monitor BellSouth's compliance with its obligations under Section 271 of the Telecommunications Act to provide nondiscriminatory access to network elements in accordance with the requirements of Section 251 of the Act. These performance measurements were established in conjunction with BellSouth's request for entry into the in-region interLATA market pursuant to Section 271. If BellSouth fails to meet the established performance measurements, it must pay a monetary penalty to the CLEC or the State.

Because the FCC has de-listed some of the Section 251 network elements on which BellSouth was required to report, BellSouth contends that reporting on those elements is no longer appropriate or fair. BellSouth points out, for example, that other telecommunications carriers now provide network elements to CLECs without the burden of the performance measurement requirements.

The CLECs contends that the performance measurements were instituted to confirm BellSouth's compliance with Section 271 and that even when certain network elements are no longer available under Section 251, BellSouth must still provide meaningful, non-discriminatory access to them pursuant to the Section 271 checklist. The CLECs argue that the justification for the institution of performance measurement plans in Section 271 proceedings was to ensure that ILECs did not "backslide" on their promises to maintain open local telecommunications markets. The argue that the need to prevent backsliding does not change simply because the items will not be provided pursuant to Section 271 rather than 251.

Analysis

We decline to reach a decision on this issue in this proceeding. We believe that the questions raised here would be more appropriately addressed in Docket U-22252 (Subdocket C) "In Re: BellSouth Telecommunications, Inc. Service Quality Performance Measurements."

Issue Number 14

What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in the Interconnection Agreements to implement commingling (including rates)?

"Commingling" is defined in the federal regulations implementing the FCC's TRO and TRRO as

> the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services. Commingle means the act of commingling.[37]

[37] 47 C.F.R. §51.5.

In this proceeding, BellSouth and the CLECs disagree on whether BellSouth has an obligation to implement at the request of a CLEC the commingling of unbundled Section 251 network elements with unbundled Section 271 network elements. With the FCC's de-listing of certain Section 251 UNEs, this question has become very important to CLECs who hope to continue their provision of services by commingling still available Section 251 UNEs with Section 271 UNEs.

(The administrative law judges wishes to note, at this point, that this Commission's Order U-28131 Consolidated With Order U-28356, issued in this proceeding on March 7, 2006, specifically declined to order BellSouth to include Section 271 elements in Section 252 interconnection agreements. The Order provides that "Section 271 elements are more properly contained in arms-length, commercial agreements, subject to the FCC's enforcement authority." The Commission did not conclude that it lacks the authority to require BellSouth to include Section 271 elements in interconnection agreements, but rather that it declines to do so.

There is no question, however, that this Commission has been delegated authority through the Telecommunications Act to approve or reject the provisions contained in interconnection agreements between BellSouth and CLECs, utilizing applicable law. The very purpose of this proceeding is to consider amendments to interconnection agreements to ensure that they correctly implement changes in the law applicable to interconnection. One such change concerns the scope of BellSouth's obligation to implement commingling arrangements at the request of a CLEC.

The administrative law judge believes that the Commission's authority pursuant to Section 252 necessarily extends to the approval or rejection of language proposed for the purpose of implementing federal interconnection regulations concerning commingling. Accordingly, the discussion to follow rests upon that assumption.)

BellSouth contends that the TRO clearly excludes Section 271 network elements from the CLEC's commingling option. It is BellSouth's position that language in the TRO limits the scope of "wholesale services" available for commingling to "tariffed access services," only, thereby excluding Section 271 network elements. BellSouth also contends that only the FCC has the authority to regulate BellSouth's compliance with its Section 271 obligations. Thus, BellSouth argues, this Commission has no authority over Section 271 obligations. Finally, BellSouth argues that if Section 271 elements are made available for commingling arrangements, the result will be an undermining of the TRRO's findings that required the de-listing of UNE-P due to the investment disincentives the offering of UNE-P created.

The CLECs contend that commingling does not exclude wholesale facilities and services offered pursuant to the Section 271 checklist. According to the CLECs, a complete reading of the TRO and the TRO Errata demonstrates that commingling is available for the connection of Section 251 UNEs with any "wholesale facilities and services" provided by BellSouth. The CLECs assert that because Section 271 checklist services are "wholesale facilities and services," the TRO specifically requires BellSouth to commingle such services to a UNE or UNE combinations.

Analysis

The definition provided for "commingling" in the federal regulations refers to the linking of a UNE or UNE combination to one or more services that a CLEC has obtained "at wholesale" from an ILEC. The federal regulations place an obligation upon ILECs to "perform the functions necessary to commingle" UNEs and UNE combinations with "one or more facilities or services

that a requesting telecommunications carrier has obtained at wholesale" from an ILEC.[38] While there is no dispute among the parties that Section 271 checklist network elements are "wholesale facilities and services," BellSouth suggests that the TRO *excludes* Section 271 network elements from the list of "wholesale" services and facilities which may be commingled.

At Section 584 of the TRO, the FCC provides:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251(c)(4) of the Act.[39]

As reflected in the Errata to the TRO, that provision originally contained an additional phrase, with the full statement reading as follows:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including *any network elements unbundled pursuant to section 271 and* any services offered for resale pursuant to section 251(c)(4) of the Act.[40] (Emphasis supplied to indicate phrase contained in original provision.)

BellSouth contends that the FCC's decision to delete that phrase in the Errata indicates the FCC's intent to exclude Section 271 elements from the "wholesale facilities and services" which are to be made available for commingling. The CLECs respond that the deletion of the phrase simply corrects a redundancy; since Section 271 elements *are* wholesale services and facilities, the inclusion of that phrase would be redundant.

The CLECs contend that its position is strengthened by the fact that the FCC also deleted another sentence from the TRO at footnote 1990. That footnote appears within a discussion concerning the different requirements imposed upon Bell operating companies by Sections 251 and 271. The footnote originally contained the following sentence, which was deleted by the Errata:

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[38] 47 C.F.R. §51.309(f).
[39] TRO at §584, Corrected by Errata, issued on September 17, 2003.
[40] TRO at §584, Corrected by Errata, issued on September 17, 2003.

> We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these (Section 271) checklist items.

The CLECs contend that this deletion confirms the FCC's intent that Section 271 elements *not be excluded* from the commingling requirements. BellSouth disagrees, arguing that if the FCC intended to include Section 271 in the commingling requirements, it would have deleted the language in footnote 1990 and retained the language which it deleted from Section 584.

BellSouth further points out that the TRO refers to "tariffed access services" in describing "wholesale" services which are subject to the commingling requirement. The CLECs respond that the use of "tariffed access services" as an example of a "wholesale" service in no way implies an exclusion of all other "wholesale" services to which the commingling options apply.

From our overall reading of the TRO, Errata, and federal regulations, we discern no intent by the FCC that Section 271 elements are to be excluded from the "wholesale" facilities and services which CLECs are permitted to commingle with UNEs and UNE combinations. The FCC could easily have stated its intent to exclude Section 271 elements, but, in fact, did not. Moreover, the FCC deleted a sentence from the TRO which would have accomplished such an exclusion. Accordingly, we conclude that the "wholesale" facilities and services available for commingling with UNEs and UNE combinations include services available only pursuant to Section 271.

We have declined, in this proceeding, to order BellSouth to include Section 271 elements in interconnection agreements; thus, it is unclear at this time what Section 271 elements will be "available," possibly as a result of FCC action, for commingling purposes. Therefore, we are unable to make any conclusions concerning the nature of commingling arrangements which might be available to CLECs using Section 271 elements.

Issue Number 15

Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?

There appears to be little dispute between the parties on this issue. The TRO provides that a CLEC may convert UNEs and UNE combinations to wholesale services and may convert wholesale services to UNEs and UNE combinations, so long as the CLEC meets the applicable eligibility criteria.[41] BellSouth and the CLECs have apparently reached agreement with regard to applicable terms and conditions for such conversions – but not with regard to conversion rates. The CLECs object to the rates proposed by BellSouth and contend that new conversion rates must be established through a proceeding allowing for discovery and cross-examination. The CLECs propose that the conversion rate currently applicable to EEL conversions should be utilized until new conversion rates have been approved in proceeding initiated for that purpose.

Analysis

As BellSouth and the CLECs have apparently reached agreement with regard to applicable terms and conditions for such conversions – but not with regard to conversion rates, we address only the rate issue. The TRO instructs that any charges assessed by ILECs in connection with these conversions must be just, reasonable, and nondiscriminatory.[42] The record in this proceeding is insufficient for the purposes of determining whether the rates proposed by BellSouth are just, reasonable, and nondiscriminatory. Accordingly, we conclude that if the parties are unable to reach agreement on applicable conversion rates, BellSouth shall file proposed rates with the Commission and initiate a rate proceeding.

[41] TRO at §586.
[42] TRO at §587.

Issue Number 16

What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?

We find that this issue should more appropriately be addressed in the rate proceeding to be initiated pursuant to our conclusions in Issue Number 15.

Issue Number 17

Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

Analysis

"Line sharing" is defined in the federal regulations as

> the process by which a requesting telecommunications carrier provides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high frequency portion of the loop.[43]

As part of the new unbundling rules announced in the FCC's TRO, ILECs were relieved of the obligation to make available as UNEs the high frequency portion of the loop for line sharing purposes pursuant to Section 251. However, the FCC determined that the requirements of Section 271(c)(2)(B), which are the requirements which a Bell Operating Company must meet in order to provide in-region interLATA (long distance) services, establish an independent obligation for Bell Operating Companies to provide access to network elements, regardless of the unbundling analysis under Section 251.[44]

In Docket U-28027, a petition for arbitration of an interconnection agreement between BellSouth and DIECA Communications, Inc. d/b/a Covad Communications Company, this

[43] 47 C.F.R. §51.319(a)(1)(i).
[44] TRO at §653.

Commission issued an Order on January 13, 2005, finding that BellSouth has a continuing obligation to provide line sharing under Section 271 unless that obligation was removed as a result of a petition for forbearance filed by BellSouth with the FCC.[45] On January 18, 2006, the Commission voted to approve a ruling by the administrative law judge that the FCC Forbearance Order issued in response to BellSouth's petition did not relieve BellSouth of its Section 271 line sharing obligations.[46] Recently, on February 22, 2006, the Commission rejected the administrative law judge's recommendation in U-28027 that the Commission has jurisdiction to set rates for Section 271 line sharing within the context of the arbitration.[47]

Thus, within Docket U-28027, this Commission determined that BellSouth has a continuing Section 271 obligation to provide line sharing. However, the Commission rejected a finding that it had jurisdiction to set rates for Section 271 line sharing for purposes of that arbitration.

When the Commission took up Issue Number 8 in this proceeding at its February 22, 2006 Business and Executive Session, it announced no specific decision concerning its jurisdiction over Section 271 obligations and rates; however, the Commission voted to *decline* to order BellSouth to include Section 271 elements in Section 252 interconnection agreements and voted to *decline* to set rates for Section 271 elements.

Accordingly, as previously concluded in our Order 28027, we answer in the affirmative to Issue Number 17 – that BellSouth does have a continuing Section 271 obligation to provide line sharing. However, in accordance with our decision at the February 22, 2006 Business and Executive Session, we decline to order BellSouth to include Section 271 elements in interconnection agreements and we decline to set rates for such elements.

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[45] Order U-28027, issued January 13, 2005.
[46] See Minute Entry of January 18, 2006 Business and Executive Session.
[47] See Minute Entry of February 22, 2006 Business and Executive Session.

Issue Number 19

What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

The federal regulations define "line splitting" as

> the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.[48]

The regulations require ILECs to provide to CLECs leasing an unbundled copper loop the ability to engage in line splitting arrangements with another CLEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent.[49] ILECs are also required to make all necessary network modifications for loops used in line splitting arrangements.[50]

The dispute between the parties concerns whether line splitting can involve the commingling of 251 and 271 elements and whether BellSouth must provide the CLECs with splitters.

Analysis

With regard to provision of the splitter, we look to the TRO and its discussion of line splitting. The FCC notes in section 251 of the TRO that

> The Commission previously found that existing rules require incumbent LECs to permit competing carriers to engage in line splitting where a competing carrier purchases the whole loop and provides its own splitter to be collocated in the central office. We reaffirm those requirements but, for purposes of clarity and ensuring regulatory certainty, we find that it is appropriate to adopt line splitting-specific rules.

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[48] 47 C.F.R. §51.319(a)(1)(ii).
[49] *Id.*
[50] Id. At (a)(1)(ii)(B).

The TRO goes on to describe some of the line splitting-specific rules being adopted. The TRO makes no mention, however, of any new rule regarding provision of the splitter.

We need not address whether line splitting can involve the commingling of 251 and 271 elements, in light of our February 22, 2006 decision – declining to order BellSouth to include Section 271 elements in Section 252 agreements.

We conclude that, since the TRO refers to existing rules which provide that the CLEC shall provide its own splitter, and since the TRO makes no reference to a change in that rule, the obligation to provide a splitter remains with the CLEC.

Issue Number 22

What is the appropriate ICA language, if any, to address access to call related databases?

This issue arises from the CLECs' contention that BellSouth continues to have a Section 271 obligation to provide access to call related databases, despite changes in BellSouth's unbundling obligations pursuant to Section 251. BellSouth disputes the CLECs' contention.

Analysis

We need not address whether BellSouth continues to have a Section 271 obligation to provide access to call related databases, in light of our February 22, 2006 decision – declining to order BellSouth to include Section 271 elements in Section 252 agreements.

Issue Number 23

(a) What is the appropriate definition of minimum point of entry ("MPOE")?
(b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominately residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?

Issue Number 28

What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?

These two issues concern the FCC's unbundling obligations for fiber loops, including fiber to the home loops ("FTTH") and fiber to the curb loops ("FTTC"). A fiber to the home loop consists entirely of fiber optic cable serving an end user's customer premises or a multiunit premises' minimum point of entry. A fiber to the curb loop consists of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or a multiunit premises' minimum point of entry.[51]

As a result of the TRO's unbundling rules, an ILEC's obligation to provide nondiscriminatory unbundled access to fiber to the home and fiber to the curb loops has been significantly limited. ILECs are no longer required to provide these fiber loops to an end user's customer premises which has not been served by an loop facility (a new build), or when the ILEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility (an overbuild).[52]

BellSouth and the CLECs have only one fundamental disagreement concerning the unbundling of fiber loops, and that disagreement concerns the customer groups to which the rules apply. The CLECs claim that BellSouth was not granted a total exception to its loop

[51] 47 C.F.C. §51.319(a)(3)(i).
[52] Id. At (a)(3)(ii) and (iii).

unbundling obligations for all fiber loops. They contend that these unbundling rules apply only to loops provisioned to mass market customers - not to loops provisioned to enterprise customers.

BellSouth disagrees, arguing that the FCC's unbundling decisions regarding fiber loops are based on technology, not on the customer to be served. Thus, it is BellSouth's position that the unbundling rules promulgated for fiber loops apply to all provision of fiber loops, regardless of the customer being served.

Analysis

We agree with BellSouth. It is true, as the CLECs point out, that the TRO's unbundling rules are organized under two specific market groups – the mass market group and the medium and large business enterprise market[53] – and analyzed under those two market groups:

> Consistent with our statutory mandate and relevant judicial precedent, we focus on specific market and customer characteristics as informed by the various loop types and capacities that typically serve these markets and customers to undertake the granular inquiry necessary to determine where loop impairment exists. In distinguishing among the various types of loop facilities, *i.e.*, DS0 (voice-grade/POTS), DS1, DS3, OCn and dark fiber, we recognize that these facilities, as a practical matter, typically serve distinct classes of customers, resulting in different economic considerations for competitive carriers seeking to self-deploy.[54]

This approach is explained as follows:

> Through this approach we are able to more precisely calibrate our rules to ensure that competitive LECs only gain access to unbundled loops where they are impaired under the standard we adopt above, *i.e.*, where they cannot economically self-provision loops and competitive alternatives do not exist. To that end, we conduct separate loop impairment analyses based on loop types and capacity

[53] TRO footnote 624 describes the mass market as consisting "primarily of residential and similar, very small, business users of analog POTS. The enterprise market is a business customer market of typically medium to large businesses with a high demand for a variety of sophisticated telecommunications services."
[54] TRO at §197.

> levels, which also consider two relevant customer classes – the mass market and the enterprise market.[55]

Thus, because fiber loops are provisioned predominantly to mass market customers, they are addressed in the "mass market" discussion; since DS1 loops are provisioned predominantly to enterprise market customers, they are addressed in the "enterprise market" discussion.

However, the TRO specifically explains that this method of organization and analysis of unbundling does not limit the application of the rules; to the contrary, the rules "apply with equal force to every customer served by a loop type."[56]

> Our loop unbundling analyses takes into account the relevant customer market typically served by the loop capacity involved. However, we recognize that although each loop type and capacity level may be used predominantly to provide service to a particular customer group, that same loop also may be used to provide service across a range of customer categories. For that reason, though our loop unbundling analysis focuses upon the customer classes most likely to be served by a specific type of loop, the unbundling rules we adopt apply with equal force to every customer served by that loop type.[57]

The FCC reiterates, at Section 210 of the TRO that "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served."

Accordingly, we conclude that the unbundling rules for fiber to the home and fiber to the curb loops are applicable to the provisioning of these loops in all customer markets.

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[55] *Id.*
[56] TRO at footnote 623.
[57] *Id.*

Issue Number 24

What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

A *hybrid loop* is defined in the federal regulations as "a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant."[58] Pursuant to the regulations, an ILEC is not required to provide unbundled access to the "packet switched features, functions and capabilities of its hybrid loops."[59]

The parties have raised no concerns with regard to this definition or unbundling rule. However, BellSouth objects to the CLECs proposal of language which would require BellSouth to provide access to hybrid loops as a Section 271 obligation.

Analysis

We will not address proposed language which would require BellSouth to provide access to hybrid loops as a Section 271 obligation in light of our February 22, 2006 decision, declining to order BellSouth to include Section 271 elements in Section 252 interconnection agreements.

[58] 47 C.F.R. §51.319(a)(2).
[59] *Id.*

Issue Number 26

What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

Issue Number 27

What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICA's?

Issues 26 and 27 concern BellSouth's obligation to provide routine network modifications.

A *routine network modification* is defined in the federal regulations as "an activity that the incumbent LEC regularly undertakes for its own customers."[60] ILECs are required by the regulations to make all routine network modifications to unbundled loop facilities used by a CLEC and to unbundled dedicated transport facilities used by a CLEC.[61]

Line conditioning is defined in the federal regulations as "the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service."[62] The federal regulations require ILECs to condition a copper loop at the request of a CLEC, and ILECs may recover their costs for such conditioning under TELRIC prices.

BellSouth and the CLECs disagree on the relationship between routine network maintenance obligations and line conditioning obligations. BellSouth considers line conditioning to be a subset of routine network maintenance obligations, while the CLECs

[60] 47 C.F.R. §51.319 at (a)(7)(ii) and (c)(4)(ii).
[61] *Id.* At (a)(7)(i) and (c)((4)(i).
[62] 47 C.F.R. §51.319(a)(1)(2).

maintain that line conditioning imposes requirements on BellSouth which are separate and distinct from its network maintenance obligations.

The CLECs contend that this distinction is significant in that BellSouth's routine network maintenance obligations require only that BellSouth undertake activities which it regularly undertakes for its own customers, while line conditioning obligations require BellSouth to condition a line at the request of a CLEC, without regard to whether BellSouth undertakes the requested type of activity for its own customers. BellSouth argues that both its line sharing and routine network maintenance obligations require only that it undertake activities that it regularly undertakes for its own customers.

According to the CLECs, this distinction gains in importance as broadband services continue to evolve. They contend that BellSouth could slow a CLEC's deployment of new technology by declining to perform line conditioning, on the basis that it is obligated only to perform routine network maintenance. If the new technology is not one that BellSouth provides to its own customers, and since routine network maintenance is defined as activity that an ILEC undertakes to provide for its own customers, BellSouth could decline to perform the requested line conditioning for the requesting CLEC since it is not an activity which it regularly undertakes for its own customers.

The distinction is also pertinent to the rates BellSouth is allowed to charge. BellSouth contends that if it is obligated to provide line conditioning of a kind that it does not routinely provide for its own customers, it should be permitted to charge a commercial or tarrifed rate rather than TELRIC rates. The CLECs dispute this contention and further argue that BellSouth must obtain approval of any individual case basis pricing it attempts to impose for routine network modifications.

Analysis

Line conditioning and routine network maintenance obligations are addressed separately in the TRO and in the federal regulations and impose separate and distinct obligations on ILECs. Routine network maintenance, which ILECs must provide, is described as "those activities that incumbent LECs regularly undertake for their own customers."[63] Line conditioning is described as "the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service." The limiting language applied to routine network maintenance – "those activities that incumbent LECs regularly undertake for their own customers – is not used to describe the ILEC's line conditioning obligations.

However, in Section 643 of the TRO, the FCC responds to arguments by some ILECs that line conditioning creates a superior network by explaining that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their customers." While this language is interpreted by BellSouth to impose on line conditioning obligations the same limitations imposed upon routine network maintenance obligations, the implications of that section are unclear. We find no language in the TRO which indicates a clear intention by the FCC to alter the description of line conditioning obligations to "match" routine network maintenance obligations" or to subsume the line conditioning obligations under routine network maintenance obligations. The federal regulations implementing the TRO continue to address the two obligations as separate and distinct requirements.

Accordingly, we conclude that line conditioning obligations and routine network maintenance obligations exist as separate ILEC requirements. We concur with the Commission

[63] TRO at §632

Staff's suggestion that interconnection agreements should include the specific language contained in the federal regulations describing line conditioning and routine network maintenance obligations. Disagreements with regard to BellSouth's obligations under either category of obligations may be submitted to the Commission for arbitration.

To the extent BellSouth wishes to assess charges for costs it claims are not already recovered in Commission-approved recurring or non-recurring rates, we concur with the CLECs' position that BellSouth must file a rate application and supporting documentation with the Commission and obtain approval.

Issue Number 29

What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

The FCC permits CLECs to convert special access circuits to unbundled combinations of loop and transport, known as EELs (Extended Enhanced Links) through a self-certification process. The CLECs are pemitted to self-certify that they satisfy the qualifying service eligibility criteria for high-capacity EELs. ILECs must accept the self-certifications, but they have been given limited audit rights, in accordance with which they may audit a CLEC's compliance with qualifying service eligibility criteria. This issue concerns the process by which such audits are to be conducted. The parties here have not reached agreement on implementing language.

Analysis

The TRO is fairly specific concerning the auditing process to be implemented. The provisions permit an ILEC to obtain and pay for an independent auditor to audit a CLEC's compliance with the qualifying service eligibility criteria. The TRO provides for audits to be

conducted on an annual basis and establishes requirements with regard to the standards to be adhered to by the independent auditor. The TRO also provides that the auditor's report will reach a conclusion concerning whether the CLEC complied in all material respects with the applicable service eligibility criteria. If the conclusion is that the CLEC failed to comply, the CLEC must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, make the correct payments on a going forward basis, and reimburse the ILEC for the cost of the auditor. If the conclusion is that the CLEC complied in all material respects with the criteria, the ILEC must reimburse the CLEC for its costs associated with the audit.[64]

In light of the parties' failure to reach agreement as to the language to be used in interconnection agreements, we direct that they utilize the specific wording utilized in the TRO to describe the process – with the following additional instructions. We note, first, the FCC's stated intent, in Section 622 of the TRO, that the auditing process is to be based "upon cause." Accordingly, the audit process shall begin with written notice to the CLEC, at least thirty (30) days prior to the start of the audit, which notice shall contain BellSouth's specific allegations of non compliance, shall include a listing of the particular circuits for which BellSouth alleges noncompliance, and shall be accompanied by all supporting documentation. Second, in order to ensure the independence of the auditor, BellSouth shall also provide in its written notice a list of three auditors from which the CLEC may choose one to conduct the audit.

[64] TRO at §§626 – 628.

Issue Number 31

What language should be used to incorporate the FCC's *ISP Remand Core Forbearance Order* into interconnection agreements?

Analysis

We concur with the CLEC's proposal that the FCC's ISP Remand Core Forbearance Order may be reasonably incorporated into interconnection agreements by deleting all references to "new markets" and "growth cap" restrictions. Such revisions shall be accomplished along with other amendments resulting from our decision in this proceeding.

Issue Number 32

How should the determinations made in this proceeding be incorporated into existing Section 252 interconnection agreements?

As provided in Issue 3, ILECs and CLECs whose interconnection agreements are impacted by the changes in law addressed in this proceeding must move promptly, upon the effective date of the Order in this proceeding, to execute amendments to those interconnection agreements to effect the Commission's decisions here. It appears that there is no disagreement between BellSouth and the CLECs on that point. The CLECs and BellSouth are directed to initiate that process by submitting to the Commission Staff for approval, within sixty (60) days of the effective date of this Order, language which implements the decisions contained herein.

We further direct that all pending arbitration proceedings shall be bound by the decisions of the Commission in this proceeding, except with regard to issues as to which the parties have negotiated a different treatment.

Finally, we direct that the decisions reached herein shall have general applicability to interconnection agreements in Louisiana, except with regard to issues as to which the parties have negotiated a different treatment.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA

DISTRICT II
CHAIRMAN JAMES M. FIELD

DISTRICT I
VICE CHAIRMAN JACK "JAY" A. BLOSSMAN

DISTRICT IV
COMMISSIONER C. DALE SITTIG

DISTRICT V
COMMISSIONER FOSTER L. CAMPBELL

LAWRENCE C. ST. BLANC
SECRETARY

DISTRICT III
COMMISSIONER LAMBERT C. BOISSIÈRE, III

Agenda Date: 3/16/06
Agenda Item: 4F

FILED
MAR 29 2006
MISS. PUBLIC SERVICE COMMISSION

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

IN THE MATTER OF THE PETITION OF VERIZON NEW JERSEY INC. FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH COMPETITIVE LOCAL EXCHANGE CARRIERS IN NEW JERSEY PURSUANT TO SECTION 252 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, THE TRIENNIAL REVIEW ORDER AND THE TRIENNIAL REMAND ORDER	)	TELECOMMUNICATIONS ORDER DOCKET NO. TO05050418
IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS D/B/A COVAD COMMUNICATIONS COMPANY, SNIP LINK LLC, XO COMMUNICATIONS SERVICES, INC. AND XTEL COMMUNICATIONS, INC. FOR AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH VERIZON NEW JERSEY INC., PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, THE TRIENNIAL REVIEW ORDER AND THE TRIENNIAL REMAND ORDER	)	DOCKET NO. TO05070606
IN THE MATTER OF THE PETITION OF XO COMMUNICATIONS SERVICES, INC. FOR ARBITRATION OF AN AMENDMENT TO AN INTERCONNECTION AGREEMENT WITH VERIZON NEW JERSEY INC.	)	DOCKET NO. TO05060551
IN THE MATTER OF THE PETITION OF ATX LICENSING, INC.; CTC COMMUNICATIONS CORP.; ICG TELECOM GROUP, INC.; AND LIGHTSHIP TELECOM LLC FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH VERIZON NEW JERSEY INC. PURSUANT TO SECTIONS 251, 252 AND 271 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND THE TRIENNIAL REVIEW ORDER AND TRIENNIAL REVIEW REMAND ORDER	)	DOCKET NO. TO05060552

(SERVICE LIST ATTACHED)

BY THE BOARD:

By Petition dated May 10, 2005, Verizon New Jersey Inc. ("VNJ") requested that the New Jersey Board of Public Utilities ("Board") initiate a consolidated arbitration proceeding to amend its interconnection agreements with certain competitive local exchange carriers ("CLECs") to reflect changes in VNJ's unbundling obligations, in accordance with the Federal Communications Commission's ("FCC") Triennial Review Order ("TRO")[1] and the FCC's Triennial Review Order on Remand ("TRRO")[2]. The legal issues arising out the discussions between the carriers regarding the changes to existing interconnection agreements concern interpretation of the TRO and the TRRO.

VNJ is an incumbent local exchange carrier ("ILEC") as defined by section 251(h) of the 1996 federal Telecommunications Act ("the Act"). The CLECs are, individually, companies with interconnection agreements with VNJ arising under sections 251 and 252 of the Act. The underlying interconnection agreements were each approved by the Board pursuant to its authority under section 252 of the Act.

VNJ sought to amend its agreements with seven CLECs: ACN Communications Services Inc.; AT&T Communications of New Jersey L.P.; Gillette Global Network, Inc.; IDT America Corp.; Monmouth Telephone & Telegraph, Inc.; Qwest Communications Corporation; and Sprint Communications Company L.P. VNJ sought arbitration with these CLECs because their interconnection agreements might be misconstrued to call for amendment before VNJ may cease providing unbundled network elements ("UNEs") eliminated by the TRO.

When amendments to interconnection agreements are sought which affect the rights and obligations set forth in the agreement, such changes must be implemented through negotiation or arbitration according to the unbundling rules of the FCC. From this process, the attached Amendment was drafted and executed by the parties. The Board is now tasked with the duty to approve or disapprove of the Amendment based upon the associated Arbitration decisions.

BACKGROUND

On August 21, 2003, the FCC released its Triennial Review Order, which became effective on October 2, 2003. On that date, VNJ notified New Jersey CLECs of its intent to negotiate an amendment to its interconnection agreements to implement the changes of law arising under the Triennial Review Order.

Based upon this notice, VNJ filed a Petition for Arbitration on February 20, 2004, requesting that the Board initiate a consolidated arbitration proceeding to amend the interconnection

[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338);Implementation of Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98);Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147), Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, released August 21, 2003 (TRO).

[2] In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290, (Rel. Feb. 4, 2005) (TRRO).

agreements between VNJ and over 100 CLECs and Commercial Mobile Radio Service ("CMRS") providers in New Jersey. VNJ requested approval of its proposed interconnection agreement amendment, which it asserted would implement changes to its unbundling obligations arising under the FCC's TRO.

The D.C. Circuit Court of Appeals, on March 2, 2004, vacated portions of the rules adopted in the FCC's TRO, and remanded those rules for further proceedings before the FCC. (The "USTA II" decision)

On May 7, 2004, VNJ filed a motion seeking to hold the arbitration proceeding in abeyance until June 15, 2004. On June 18, 2004, the Board ordered VNJ to continue providing unbundled network elements to CLECs for a minimum of 90 days after issuance of the USTA II mandate. The Board stated that "[a]ny modifications to the rates, terms or conditions contained in approved interconnection agreements during and after the 90 day period must be approved by the Board, consistent with applicable law, and shall be subject to such further orders as the Board may hereafter issue."

Thereafter, on August 12, 2004, VNJ filed a Notice of Withdrawal of its Petition for Arbitration with respect to all CLECs and CMRS providers included in its original Petition except seven parties. In its Notice of Withdrawal, VNJ claimed that no amendment was required under the individual interconnection agreements with the named carriers to discontinue providing those UNEs no longer subject to an unbundling obligation under section 251(c)(3). Specifically, VNJ argued that it could unilaterally notify the named carriers of its intent to discontinue providing UNEs that were eliminated under section 251(c)(3) based upon either the TRO or the D.C. Circuit's mandate in USTA II.

On February 4, 2005, the FCC released the text of its TRRO. The rules adopted in the TRRO constitute a change in law under the individual interconnection agreements.

On May 10, 2005, VNJ filed a Notice of Withdrawal of its February 20, 2004 Petition for Arbitration with respect to the remaining seven parties and requested that the Board close Docket No. TO04040111. Contemporaneous with its Notice of Withdrawal, VNJ filed a new Petition for Arbitration with the seven parties to initiate a consolidated arbitration proceeding to amend VNJ's interconnection agreements with the seven CLECs VNJ claimed that its agreements with all other CLECs "clearly specify that VNJ may discontinue, upon notice, UNEs that it has no legal obligation to provide under federal law." Thus, VNJ argued "there is no need to amend these contracts to give contractual effect to the changes in unbundling obligations as a result of the TRO and TRRO."

AT&T Communications of NJ, L.P. (AT&T), in its response dated June 3, 2005, stated that two of its entities, TCG Delaware Valley, Inc. and Teleport Communications New York, should be included in this proceeding.

On June 6, 2005, DIECA Communications d/b/a/ Covad Communications Company, IDT America Corp.; SNiP LiNK LLC, XO Communications Services, Inc. (formerly Allegiance Telecom of New Jersey Inc. and XO New Jersey, Inc.), and XTel Communications, Inc. (collectively, the "CCC") filed a petition for arbitration and a motion that requested that the Board consolidate its filing with the petition filed by VNJ (Docket No. TO05050418) as the issues are predicated on the same legal issues arising under the TRO raised by VNJ.

On June 16, 2005, XO Communications Services, Inc. ("XO") filed a petition for arbitration seeking resolution of additional issues arising between XO and VNJ in the negotiation of an amendment to their interconnection agreement to reflect a change in law arising out of the TRO.

On June 24, 2005, ATX Licensing, Inc., CTC Communications Corp., ICG Telecom Group, Inc., and Lightship Telecom LLC (collectively, the "CCG") filed a petition for arbitration and a motion that requested that the Board consolidate this matter with the petition filed by VNJ (Docket No. TO05050418) as the issues raised in this petition are identical to the issues raised by VNJ.

By letter dated July 1, 2005, VNJ stated that it does not object to consolidating the petitions filed by the CCC and the CCG with VNJ's instant proceeding. In addition, VNJ presumed that the XO petition would be consolidated. Further, VNJ also stated that it did not object to including the two AT&T entities in this proceeding.

By letter dated July 11, 2005, XO responded to VNJ and objected to consolidation of the petition. XO stated that consolidation would unnecessarily delay resolution of XO's petition.

On August 17, 2005, the Board accepted Staff's recommendation to consolidate these matters and an RFQ was issued for an Arbitrator. Honorable Daniel O'Hern was selected to preside over this matter as Arbitrator.

On September 13, 2005, the parties convened for a Pre-hearing Conference, presided over by Arbitrator O'Hern, where the initial procedural schedule was set. Pursuant to the schedule, parties filed Initial Briefs on September 23, 2006 and Reply Briefs on September 30, 2005. On October 14, 2005, a Status Conference was convened between the parties by Arbitrator O'Hern, where the proposed schedule was revised to allow additional time for negotiation by the parties. A status conference was held in November 2005, where the parties informed Arbitrator O'Hern of the remaining issues which they had not resolved through settlement. Arbitrator O'Hern issued his Recommended Decision on December 1, 2005 ("Recommended Decision"). The parties filed their Exceptions to the Arbitrator's Recommended Decision on December 12, 2005. Arbitrator O'Hern issued his Decision on the Exceptions on January 3, 2006 ("Decision on Exceptions"). Arbitrator O'Hern held a telephonic drafting conference on January 30, 2006. The Parties filed the Amendment to the Interconnection Agreement with language conforming to the Arbitrator's Decision on February 10, 2006. VNJ concurrently filed a Letter with the Board identifying its Objections to certain conforming language in the Amendment. The Division of the Ratepayer Advocate filed its Comments on the Amendment on February 28, 2006. The CLECs also filed its response to VNJ's Objections on February 28, 2006. On March 1, 2006, VNJ filed a Motion to Strike the CLEC objections.

ARBITRATOR'S DECISIONS AND AMENDMENTS TO THE INTERCONNECTION AGREEMENTS

On August 15, 1996, the Board, in Docket No. TX96070540 issued an Order nominated I/M/O the Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996. This Order serves as the blueprint for the Board's review of the current application, and it is within this framework that the Board makes its determinations. As directed by that Order, the Arbitrator's decision has been reduced to individually executed Amendments to Interconnection Agreements, and it is this document that the Board will ultimately accept or reject. The Arbitrator's decision forms the foundation for the language in these Amendments, and thus the Board will consider and review those documents as well, but ultimately it is the Amendments that form the "decision" under review.

To the extent that the Amendments include language required by the Arbitrator's decisions but which has not been objected to by the parties, the Board has not and does not find a basis for modification or reconsideration of the Arbitrator's decision. Accordingly, rather than placing the decisions in the Order in detail, the Board HEREBY ADOPTS the reasoning of the decisions by the Arbitrator as its own, and as incorporated into the Amendments, all elements not objected to by the parties at the time or following the submission of the Amendments to the Board as if set forth here at length.

VNJ OBJECTIONS

On February 10, 2006, pursuant to Board rules, executed Amendments were filed as to VNJ and each individual CLEC. Concurrently, VNJ filed objections to portions of the amendment language decided by Arbitrator O'Hern. VNJ raised three objections to the nature of the Amendments, and calls upon the Board to require modifications on all three elements.

1 The Board Should Delete the Amendment Language Stating that VNJ's New Conversions and Commingling Obligations Took Effect on October 2, 2003. (Sections 3.11.1 and 3.11.2.6.)

VNJ objects to the inclusion of language in the Amendment that set a date of October 2, 2003 for the implementation of the FCC's new commingling and conversion requirements and rates. Specifically, VNJ asks the Board to delete the "as of October 2, 2003" phrase in sections 3.11.1 and section 3.11.2.6 in its entirety[3], and to reverse any element of Arbitrator O'Hern's ruling that might be interpreted to require VNJ to implement the FCC's new commingling and conversions requirements on a retrospective basis, back to the effective date of the TRO. In the TRO, the FCC eliminated its previous commingling restriction and accordingly modified its rules to permit CLECs to commingle UNEs and UNE combinations with non-UNE wholesale services (such as tariffed switched and special access).[4] The FCC also adopted new criteria CLECs must meet to convert existing tariffed special access circuits to enhanced extended links ("EELs")[5] offered at UNE rates.[6] VNJ claims that the ruling by Arbitrator O'Hern and subsequent Amendment

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[3] The full text of Section 3.11.2.6 reads as follows:

> As required by the Arbitration Order and 47 C.F.R. § 51.318, Verizon must provide ***CLEC Acronym TXT***, as of October 2, 2003, commingling and conversions, subject to the requirements of Section 3.11.2 above. For any new or converted EEL, Verizon shall bill, and ***CLEC Acronym TXT*** shall pay the applicable rate for the equivalent UNE (if any) or Combination (if any) as of the date that ***CLEC Acronym TXT*** made the relevant conversion or commingling request to Verizon, subject to Section 3.11.2.5 above.

Verizon argues that if the Board agrees that the Arbitrator's ruling regarding the October 2, 2003 effective date should be reversed, then there is no need for Section 3.11.2.6 at all, as its only purpose is to implement the Arbitrator's ruling in cases where Section 3.11.2.5 would not otherwise govern the timing intervals for application of UNE rates.

[4] See TRO, 18 FCC Rcd at 17342, ¶ 579; 47 C.F.R. § 51.309 (e) & (f). Commingling means attaching, connecting or otherwise linking a UNE or UNE combination to one or more facilities a CLEC has obtained from the ILEC at wholesale. See 47 U.S.C. § 5.1.5 ("Commingling" definition).

[5] An EEL is a combination of a UNE loop and UNE dedicated transport. See 47 C.F.R. § 51.5 ("Enhanced extended link" definition).

[6] See TRO at 17342, 17351-366, ¶¶ 577, 591-619; 47 C.F.R. §§ 51.316 & 51.318. The EEL eligibility criteria are intended to ensure that carriers requesting EELs have demonstrated a commitment to serving the local voice market

language is unlawful because the FCC required parties to negotiate amendments to implement the new commingling and conversions rules adopted in the TRO before those obligations go into effect, and thus requiring an effective date prior to this amendment for those requirements would be in violation of the TRO.

VNJ states that Arbitrator O'Hern correctly recognized that the new commingling and EEL eligibility rules imposed in the TRO were changes of law that must, therefore, be implemented through amendments to existing interconnection agreements. The Recommended Decision, moreover, asserts that nothing in the TRO suggested that the "base entitlement provisions" for commingling and conversions "do not require ["Interconnection Agreement"] ICA Amendment though § 252 processes." Recommended Decision, at 58. Likewise, in the Decision on Exceptions, VNJ believes Arbitrator O'Hern found that because existing interconnection agreements continue to apply until amended, "any revised EEL/UNE pricing does not go into effect until the effective date of the ICAs in the proceeding." Decision on Exceptions, at 13.

Accordingly, VNJ contends that Arbitrator O'Hern should have recommended that CLECs may take advantage of the TRO's new commingling and EEL eligibility rules only once they have executed an amendment addressing these new rules. VNJ states that, despite Arbitrator O'Hern's recognition of the guiding legal principles, he inexplicably adopted Amendment language that arguably could be read to require VNJ to implement the TRO's new commingling and conversions rules, without any contract amendments, and retroactively, "as of October 2, 2003." Amendment, §§ 3.11.1, 3.11.2.6. VNJ believes this decision could allow CLECs to claim that they are entitled to retroactive UNE pricing as of the date they submitted a conversion order, as far back as October 2, 2003, even though their agreements in effect at the time did not permit commingling or address the new EEL eligibility criteria.

VNJ further states that it has no obligation to perform commingling or conversions under the FCC's new rules in the absence of an interconnection agreement amendment. VNJ claims Arbitrator O'Hern recognized that the FCC required carriers to use the Act's § 252 negotiation and amendment process to implement the new obligations imposed in the TRO, including those relating to conversions and commingling.[7] Further VNJ argues that the FCC expressly declined to "override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." TRO, ¶ 701. VNJ asserts that "individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from different interpretations of our rules." Id., ¶ 700. VNJ contends, to the extent parties could not resolve their disputes through negotiation, the FCC expected them to initiate arbitrations. Id., ¶¶ 703-04.

The FCC, claims VNJ, required carriers to translate its new commingling and conversions rules into "specific terms and conditions" before ILECs were expected to comply with these new obligations. VNJ stated that the FCC never suggested that ILECs were required to undertake the new obligations first, and only later work out the terms or conditions governing these obligations. This mechanism is different than that imposed by the TRRO. [8] In the TRRO, the FCC made its "nationwide bar" on new UNE-P arrangements and other de-listed elements

[7] Recommended Decision, at 58, 68. Neither the Board nor the Arbitrator determined (or were ever asked to determine) that the terms of particular existing agreements automatically gave effect to Verizon's commingling and conversion obligations under the TRO.

[8] See Order, Implementation of the FCC's Triennial Review Order (N.J. B.P.U. March 24, 2005), cited in Recommended Decision at 7-11.

effective on March 11, 2005, without the need for amendments to interconnection agreements and regardless of any terms in existing agreements. In the TRO, however, the FCC took a very different approach and directed the parties to follow the section 252 process to amend existing interconnection agreements, to the extent such amendments were needed. Accordingly, VNJ argues, the new obligations imposed under the TRO, including these new EEL eligibility and commingling requirements, and unlike the TRRO's transition regime, cannot be enforced except through a valid interconnection agreement amendment.

Thus, VNJ calls upon the Board to reject the language in sections 3.11.1 and 3.11.2.6 that suggests that the FCC's new commingling and conversions obligations applied as soon as the TRO took effect, without any amendment to implement them, and instead direct the parties to execute a modified Amendment in conformity with this understanding.

2 The Board Should Reject the Amendment Language Incorrectly Suggesting that the FCC's Fiber Unbundling Rules Distinguish Among Customer Groups. (Sections 3.1.2, 3.1.3.1, 4.7.27.)

VNJ asks the Board to reject all of the Amendment language suggesting that the FCC's fiber unbundling rules distinguish between mass market customers and other customers for purposes of applying the FCC's fiber unbundling rules (specifically, the "Mass Market Customer" definition in § 4.7.27, the "Mass Market" reference in § 3.1.2, and the phrase, "to a Mass Market Customer's premises" in § 3.1.3.1). In short, VNJ states that the Amendment must reflect the FCC's rules as drafted and that those rules, including the FCC's fiber-to-the-home ("FTTH") and fiber-to-the-curb ("FTTC") definitions and its substantive rules on new builds and overbuilds, expressly encompass all "customer premises," and do not make any distinction among customer types.[9] VNJ argues that the FCC deliberately removed language from the original version of its rules that could have been read to suggest such distinctions. Therefore, VNJ calls upon the Board to reject the noted language in Amendment sections 3.1.2, 3.1.3.1, and 4.7.27.

3. The Board Should Reject the Amendment Language Requiring VNJ to Determine the Lowest Available Rate for Repricing a Non-Compliant EEL Circuit When the CLEC Fails to Obtain a Replacement Service. (Section 3.11.2.2)

Section 3.11.2.2 provides that if a CLEC's EEL circuit is or becomes non-compliant with the FCC's eligibility criteria, and the CLEC fails to request disconnection or obtain a replacement service from VNJ, then VNJ may reprice the non-compliant facility equivalent to the rate for an

[9] See 47 C.F.R. § 51.319(a)(3)(iii) ("A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end-user's customer premises ..."); 47 C.F.R. § 51.319(a)(3)(i)(B) ("A fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises, or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises."); 47 C.F.R. § 51.319(a)(3)(ii) ("An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility."); 47 C.F.R. § 51.319(a)(3)(iii) ("An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility," except that the ILEC must maintain the existing copper loop connected to "the particular customer premises" unless the LEC retires the loop) (all emphases added).

analogous arrangement back to the date on which the circuit became non-compliant. Arbitrator O'Hern required the inclusion of language stating that "[t]he new rate shall be no greater than the lowest rate [CLEC] could have otherwise obtained for an analogous access service or other analogous arrangement." VNJ requests that the Board reject this quoted language.

VNJ claims that the lowest available rate offered out of VNJ's access tariff is typically a term plan rate or promotional rate, and such rates require the CLEC to either qualify or agree to keep the service in place for a period of years to obtain the benefit of the discounts. To the extent the language at issue might be construed to grant the CLECs such discounted rates without meeting the tariff qualifications or terms for obtaining these rates, or committing to the required service term period, VNJ finds the language objectionable and asks that the Board delete it from the arbitrated Amendment.

RATEPAYER ADVOCATE COMMENTS

As provided for by the Board's regulations, the Division of the Ratepayer Advocate filed comments on the Amendments. The Ratepayer Advocate noted a number of concerns:

1 Effective date of the Amendments

The Ratepayer Advocate asserts that the Amendments can not be effective until the date approved by the Board. Therefore, the Ratepayer Advocate notes that the effective date of February 7, 2006, in the Amendments must be revised to coincide with the date the Amendments are approved by the Board.

2. The Board Should ask the Arbitrator to Clarify and Supplement the Arbitrator's Discussion of Issues 4 and 5 to Affirm that 1) VNJ Must Give Prior Written Notice Of Delisting Before The Additional Wire Centers are added for delisting and 2) Notice Of Delisting Must Be Provided To The Board, Ratepayer Advocate And The CLECs.

The Ratepayer Advocate notes that Arbitrator O'Hern established a notice and a structured transition process as a means of insuring smooth transition for eliminating access to high capacity loops. The Ratepayer Advocate asks that the Board clarify that VNJ must give prior written notice of proposed delisting before adding additional wire centers to the list of wire centers where unbundling is limited. The RPA requested that advance notice of delisting be provided to the Board, the RPA and CLECs prior to and consistent with the time periods established by Arbitrator O'Hern before any action is taken by VNJ to implement delisting of additional wire centers.

3. Packet Switching

The RPA comments that, based upon the FCC's TRO decision, Arbitrator O'Hern required that the Amendments contain language to preclude unbundled access to packet switching. The RPA believes that such a conclusion usurps the Board's inherent authority to regulate and order packet switching unbundling under state law. The RPA urges the Board to revisit this issue to clarify that the Board has independent authority to order access to packet switching under Sections 251, 252 and 271 of the Act.

4 Sub-loop Access

The RPA claims Arbitrator O'Hern opined that the Amendments must direct VNJ to provide requesting CLECs with the most cost effective alternatives that are technically feasible, whether

relating to line conditioning, customer premises wiring in multi-unit premises, or narrowband services. One such method is sub loop unbundling. The RPA noted that the Board, as part of the UNE case, has not approved NJ's sub loop unbundling offering. Therefore, the RPA recommends that the Board clarify that a separate cost proceeding recommended by Arbitrator O'Hern for pricing associated with sub-loop access be conducted as part of the unfinished sub loop unbundling portion of the UNE proceeding.

5. The Board Should ask the Arbitrator to Clarify and Supplement the Arbitrator's Discussion of Issue 21 to Reaffirm the Board's Authority to 1) Review and Approve Routine Network Modifications ("RNM") Rates Included in ICAs and 2) Initiate a Proceeding to Establish RNM Generic Rates Consistent with Sections 251 and 252 of the Act.

The RPA comments that Arbitrator O'Hern directed that the Amendments should contain specific language which mirrors the language in 47 C.F.R. §51.319(a)(8), regarding VNJ's obligation to perform RNMs necessary to permit access to loops, dedicated transport, or dark fiber transport facilities where VNJ is required to provide unbundled access to those facilities under 47 U.S.C. § 251(c)(3) and 47 C.F.R. part 51.

The RPA asks that the Board clarify and supplement Arbitrator O'Hern's decision on this issue to reaffirm the Board's authority under the TRRO. Further, the RPA believed that the Board should affirmatively state that RNM rates may be arrived at by either of the following two methods: 1) RNM rates may be established through agreement by the parties subject to Board approval, 47 U.S.C. §252(e)(1) or 2) the Board may on its own initiate a proceeding to establish RNM rates. Also, the RPA urged the Board to address RNM generic rates as part of sub-loop unbundling issues that remains open in Docket TO00060356.[10]

6. The Board Should Clarify the Arbitrator's Discussion of Issue 27 and Modify its Prior Position on Section 271 of the Act.

The RPA asserts that Arbitrator O'Hern found that ICAs should not include requirements to provide network elements under Section 271 and that Section 271 of the Act does not serve to expand the scope of §§ 251 or 252. The RPA notes Arbitrator O'Hern's findings that "[N]othing in § 271 can be read as establishing state-commission arbitrated ICAs as a remedy for failure of a BOC to meet any conditions required as part of § 271." While the RPA accepts that this statement reflects the Board's current position, the RPA calls upon the Board to modify its position and assert jurisdiction under Section 271 of the Act.

Further, the RPA asks the Board to modify its Order of March 24, 2005 and reaffirm its prior 1998 Order[11] finding that the Board has the authority under the Act to order ILECs to continue to provide UNE-P in New Jersey even when the FCC decides to eliminate UNE-P as a network

[10] I/M/O the Board's Review of Unbundled Network Elements Rates, Terms, and Conditions of Bell Atlantic-New Jersey, Inc.: Summary Order of Approval, BPU Docket No. TO00060356 (Mar. 6, 2002). I/M/O the Board's Review of Unbundled Network Elements Rates, Terms, and Conditions of Bell Atlantic-New Jersey, Inc.: Order on Reconsideration, BPU Docket No. TO00060356 (Sep. 13, 2002).

[11] See I/M/.O the Investigation Regarding Local Exchange Competition, et al: telecommunications Order, BPU Dockets No. TX95120631, TO9607050519, TO98010035, TO98060343, at 5-12 (Oct. 22, 1998).

element.[12] The RPA argues that this authority applies to any network element eliminated by the FCC.

7. The Board Should Clarify the Arbitrator's Discussion of the Term "Rate" in Issue 28.

The RPA seeks further clarification of the term "rate" discussed in Issue 28. The RPA believes that it is unclear whether the reference to "rates" relates to UNE rates or transition rates. The RPA states that Arbitrator O'Hern proposed there should be a rate proceeding, including a cost study to evaluate any rate proposed by VNJ as just and reasonable, where CLECs are given an opportunity to participate. Therefore, the RPA asserts that Arbitrator O'Hern should clarify the term "rates" referenced in light of his Section 271 analysis.

8. Responses to VNJ's Objections

Regarding VNJ's first objection, the RPA comments that, under Section 252 of the Act, the effective date of any and all obligations arising from the arbitration should be the date on which the Board issues its approval of the Amendments. The RPA states that VNJ's initial argument, that the retroactive effective date could affect existing agreements that are not the subject of this arbitration, is misplaced. Those agreements (agreements with no change of law provision), according to the RPA, are already excluded. Further, the RPA claims that the Amendments at issue should have prospective effect only and the Board should reject the Arbitrator's finding and return the matter to the Arbitrator for action consistent with the Board's direction.

Concerning VNJ's second objection, the RPA proffers that it must be acknowledged that the FCC found that the mass market (including small businesses) was adversely affected whereas the enterprise market was not; and therefore Arbitrator O'Hern's reference to the applicability of the fiber unbundling rules to the mass market is a permissible interpretation. The RPA submits that the Board should reject VNJ's second objection. If, the RPA adds, the Board adopts VNJ's objection, then the matter must be remanded to Arbitrator O'Hern for further disposition so that revisions can be made and the revised Amendments re-submitted for Board approval.

In regard to VNJ's third objection, the RPA claims that VNJ's objection is premature and should be rejected as unripe for consideration. Further, the RPA asserts that, in the event of an active dispute, VNJ can avail itself of the dispute resolution processes established by the Board for resolution of issues that arise under the affected interconnection agreements. The RPA continues that, should the Board adopt VNJ's objection, the matter must be remanded to Arbitrator O'Hern for further disposition so that revisions can be made and the revised Amendments resubmitted for Board approval.

JOINT CLEC COMMENTS

The Joint CLECs opposed VNJ's objections to Arbitrator O'Hern's decisions establishing amendment language, claiming they are contrary to the just and reasonable decisions rendered in this proceeding.

[12] Section 261(c) of the Act permits the Board to "impos[e] requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part of the Commission's regulations to implement this part.

1 The Board Should Adopt the Amendment Language that Limits the Broadband Unbundling Relief Afforded to ILECs in the TRO to the Mass Market

The CLECs state that the Board should reject VNJ's request that the Amendment not limit the FCC's fiber unbundling rules associated with the broadband unbundling relief the FCC afforded to ILECs in the TRO and subsequent decisions. The CLECs assert that the FCC made clear in the TRO and subsequent orders that its FTTH and FTTC rules only apply to the mass market and the FCC rules do not trump the FCC's orders and must be read in conjunction with the FCC's orders that established such rules.[13] The CLECs believed that it was clear from these orders that the FCC limited its broadband unbundling relief to the mass market to provide ILECs with an incentive to construct new fiber loops to mass market end users because the FCC feared that unbundling obligations would otherwise dissuade such deployments to this limited class of customers.[14] Regarding enterprise customers, the CLECs believed that the FCC determined that ILECs need no economic incentives through § 251(c)(3) unbundling relief to deploy such fiber facilities and services to such customers.

The CLECs add that state commissions in California, Illinois, Maine and Indiana have also determined that the FCC's FTTH and FTTC rules apply only to mass market customers[15] and recommended that the Board affirm Arbitrator O'Hern's decision regarding this issue and the related language included in the Amendment.

2. The Board Should Adopt the Amendment Language Requiring VNJ to Utilize the Lowest Available Rate for Repricing a Non-Compliant EEL Circuit Under Certain Circumstances. (Section 3.11.2.2.)

The CLECs state that, in assessing the reasonableness of VNJ's objection, the Board should consider that the language at issue falls under Section 3.11.2.2 of the Amendment, which allows VNJ to unilaterally "reprice" a circuit that becomes non-compliant. Because VNJ has such broad authority under this provision, claims the CLECs, Arbitrator O'Hern decided to check such power with a clause that would limit VNJ's ability to impose unjust or unreasonable rates upon unsuspecting CLECs.

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13 TSR Wireless v. US West, 15 FCC Rcd 11166, ¶¶ 20-21 (explaining that its rules established in the Local Competition Order must be "read in conjunction with the rest of the Order").

14 See CCC's Position on the Economic Dynamics Associated with Unbundling Broadband Services in the Enterprise Market.

15 See Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996, Application 05-07-024, Decision Adopting Amendment to Existing Interconnection Agreements, at 7-9 (Cal. P.U.C. Jan. 26, 2006); In The Matter Of The Indiana Utility Regulatory Commission's Investigation Of Issues Related To The Implementation Of The Federal Communication Commission's Triennial Review Remand Order And Remaining Portions Of The Triennial Review Order, Cause No. 42857, Order at 11-12 (Ind. U.R.C. Jan. 11, 2006). Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order, Case No. 05-0442, Arbitration Decision, at 22 (Ill. C.C. Nov. 2, 2005); VNJ-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Docket No. 2002-682, Order, at 17 (Me P.U.C. Sep. 13, 2005).

The CLECs concluded that Arbitrator O'Hern's decision represents a reasonable balance between the interests of VNJ on the one hand and the CLECs on the other. Further, the CLECs state, Arbitrator O'Hern's decision is consistent with the principle that a determination of compliance or non-compliance under the Amendment should not result in a windfall to either VNJ or the CLECs. In conclusion, the CLECs state that Arbitrator O'Hern's reasoned and fair approach does just that by allowing VNJ to take unilateral re-pricing actions, but with some reasonable limits on such authority.

VNJ MOTION TO STRIKE

On March 1, 2006, VNJ filed a Motion to Strike, claiming that the Joint CLEC Response filed in reply to VNJ's February 10, 2006 Objections to the executed Amendments should be stricken from the record. VNJ stated that neither the scheduling orders issued by Arbitrator O'Hern nor the Board's 1996 Procedures For Arbitrations under Section 252 of the Telecommunications Act authorize the filing of a reply to Objections. Therefore, VNJ stated that the Joint CLEC Response should be stricken from the record in this proceeding.

DISCUSSION

The Board, after careful consideration and a full review of the record in this matter, makes the following determinations:

VNJ's first objection centers upon the effective date of commingling and conversion provisions of the agreement. The Arbitrator held that, to the extent that pending requests have not been converted, CLECs are substantively entitled to the appropriate pricing (upon certification and request) but no earlier than October 2, 2003. Because conversions and commingling may take some time to process, Arbitrator O'Hern allowed ninety (90) days as a reasonable period of transition. Thus, Arbitrator O'Hern recommended that pricing for commingling and conversions under the TRO be (1) effective as of the date of the amendment of the ICAs and (2) be trued up to ninety (90) days from the certification of entitlement to the conversion or commingling.

The TRO states that the unbundling provisions of Section 251 are, in large part, implemented through the execution of interconnection agreements between carriers. The FCC intended its rulings to be implemented through the 252 process of the Act. The FCC has stated that the commingling and conversion rules are new rules, not clarifications of existing rules. TRO, ¶ 579. The TRO states that these rules are not self-executing; they require amendment of interconnection agreements to be effective. TRO, ¶ 701. The rules are carried out through implementation of interconnection agreement amendments, and as such they cannot be considered effective absent the execution of the amended agreement. The FCC, unlike in the TRRO, declined to establish a transition period for the time from when the agreements are negotiated to the implementation of new agreement language. Accordingly, the Board concludes that the commingling and conversion rules should become effective upon the execution of the amendment to the interconnection agreement.

Thus, the Board HEREBY REJECTS the language of the interconnection agreements set forth in Sections 3.11.1 and 3.11.2.6 which reflects the date of October 2, 2003 as the effective date for commingling and conversions. The Board HEREBY ORDERS the parties to refile executed amendments with language conforming with the Board's findings that the implementation date for commingling and conversions is not October 2, 2003, but rather the date of execution of the interconnection agreement.

VNJ's second objection concerns the issue of the FCC fiber unbundling rules for mass market and enterprise customers. The threshold question here is whether the FCC's fiber unbundling rules and definitions are limited to the mass market or to all customer classes. The TRO held that CLECs are not impaired without access to fiber optic cable loops connecting a customer's premises with an ILEC wire center. The question then became the definition of customers, and the possible distinction in intent and impact upon the mass market and the enterprise market.

Arbitrator O'Hern found a distinction between mass market customers and other customers in applying the FCC fiber unbundling rules. Upon review of the various referenced rules, Orders and decisions in other jurisdictions, the Board concurs with the Arbitrator in this instance. The Board agrees with the position of the Ratepayer Advocate that the FCC found that the mass market, including small businesses, was adversely affected, whereas the enterprise market was not, and that therefore Arbitrator O'Hern's determination is a reasonable interpretation of what can only be described as a confusing collection of precedents and recommendations. In the absence of a clear indication by the FCC that mass market is the same as the enterprise market from a fiber point-of-view, the Arbitrator's determination is not clearly erroneous. Thus, the language in the Amendment is HEREBY AFFIRMED.

VNJ's third objection concerns Section 3.11.2.2 of the Amendment, which pertains to situations regarding non compliant High Capacity EEL circuits. The language of the Amendment states:

> [if] the CLEC has not submitted an LSR or ASR or other documentation and the CLEC has not separately secured from VNJ an alternative arrangement to replace the noncompliant High Capacity EEL, then VNJ is obligated to reprice the EEL circuit, by application of a new rate (or in VNJ's sole discretion by application of a surcharge to an existing rate) equivalent to an analogous access service or other analogous arrangement that VNJ shall identify in a written notice to the CLEC.
>
> [Amended Agreement at 20.]

This Section also states, "the new rate shall be no greater than the lowest rate [CLEC] could have otherwise obtained for an analogous access service or other analogous arrangement."

VNJ asserts that this language could be construed to enable CLECs to obtain discounted rates without qualifying under the appropriate tariff or terms for obtaining the discounted rates or absent a commitment by the CLEC to the required service term period for the discount. The Board finds that VNJ's assertion is unfounded and does not warrant a change in the executed amendment language.. The Board agrees with RPA's recommendation that VNJ's objection is premature and should be rejected as unripe for consideration. A non-qualifying CLEC should not be permitted to obtain the benefits of a discounted tariff it does not qualify for by virtue of this interconnection agreement. VNJ's obligation does not extend to providing a rate that the CLEC does not otherwise qualify for, based upon volume, guarantee, or any other foundation. The CLECs should not, and it is expected will not, present this argument, and unless and until they do, the Board need not take explicit action. The Board does, however, note to all parties that any action along this line will be dealt with in the standard enforcement and arbitration process, and in light of the notation herein. Accordingly, the Board finds that the language contained in the agreement found in Section 3.11.2.2 need not be modified and thus the language is HEREBY AFFIRMED.

The concerns raised by the Ratepayer Advocate have also been considered by the Board. The Board agrees, as noted above, with a number of the Ratepayer Advocate's recommendations with respect to Verizon's objections, but disagrees with the others set forth above. The Board declines to require separate unbundling under sections 251, 252 and 271 of the Act, see Implementation of the FCC's Triennial Review Order, Docket No. TO03090705 (April 2, 2005), and disagrees with the need to institute any additional rate review proceedings at this time. As such, the remainder of the Amendment, with the exceptions noted above, is HEREBY AFFIRMED.

CONCLUSION

In summary, the Board accepts the Amended Agreements as filed with the following exceptions and HEREBY DIRECTS the parties to execute new Agreements in conformance with this Order. Specifically, the Board HEREBY DIRECTS the parties to delete the language "as of October 2, 2003" in Section 3.11.1 and delete Section 3.11.2.6 in its entirety.

With respect to all other objections by VNJ and the RPA, the Board HEREBY DENIES all other requests for modification of the Amendment for the reasons above. Finally, the Board HEREBY REJECTS VNJ's Motion to Strike the Joint CLEC comments in the interest of maintaining a full and accurate record of the positions of the parties.

The Board directs that the parties re-execute the amendment to conform to this decision and re-file with the Board no later than five (5) business days after the issuance of this Order.

DATED: 3/27/01

BOARD OF PUBLIC UTILITIES
BY:

JEANNE M. FOX
PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

CONNIE O. HUGHES
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

CHRISTINE V. BATOR
COMMISSIONER

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

ATTEST:

KRISTI IZZO
SECRETARY

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2006, a copy of the foregoing document was served on the following, via the method indicated:

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